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CASE AND COMMENT

THE LAWYERS' INVOCATION TO SPRING

*Whereas on certain boughs and sprays
Now divers birds are heard to sing,
And sundry flowers their heads upraise,
Hail to the coming on of Spring!*

*The songs of those said birds arouse
The memory of our youthful hours,
As green as those said sprays and boughs,
As fresh and sweet as those said flowers.*

*The birds aforesaid—happy pairs—
Love, 'mid the aforesaid boughs, enshrines
In freehold nests; themselves, their heirs,
Administrators, and assigns.*

*Oh! busiest term of Cupid's court,
Where tenderest plaintiffs actions bring—
Season of frolic and of sport,
Hail, as aforesaid, coming Spring!*

H. H. Brownell

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* These questions are in the first ten cases reported in Vol. 1 L. ed., collected from pre-Revolutionary sources by A. J. Dallas, the first U. S. Supreme Court Reporter, and by him incorporated in his first volume of reports. From that day to this U. S. Supreme Court Reports have been the source of much help on those questions of most interest to lawyers. Their inclusion in eighty-two compact volumes with valuable Co-op annotations and the famous Roses Notes makes L. ed. the outstanding set of reports of the day.

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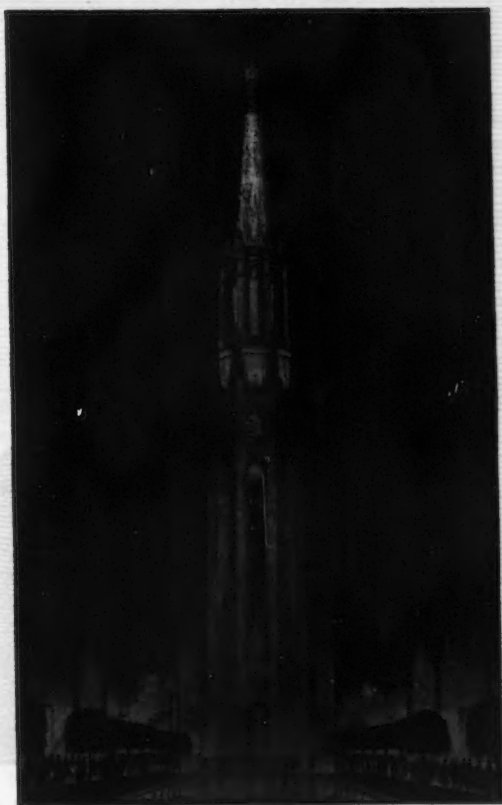
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THOMAS PAINE AND THE DARTMOUTH COLLEGE CASE

BY RALPH C. ROPER

NEW YORK CITY BAR

MOST lawyers and, perhaps, most authorities on constitutional law, may not know that more than thirty years before Daniel Webster argued and John Marshall announced the legal principles of "The Dartmouth College Case" (4 Wheat. 518, 4 L. ed. 629), Thomas Paine had anticipated such principles and had clearly and definitely expounded them, in his *"Dissertations on Government, the Affairs of the Bank, and Paper Money,"* which he wrote between December 22, 1785, and February 18, 1786. (Works, Memorial ed., Vol. IV, pp. 219-310.)

Paine was not a lawyer. His schooling had ended in the Grammar School of Thetford, England. To read his *"Dissertations,"* however, and then to run through the arguments of Webster and the reasoning of Marshall is to discover that every point made by Paine is reflected in the arguments and opinion of that famous case.

That being true, it is not only of historical, but also of practical legal interest, to reproduce his reasoning and to show how well it conformed to the arguments of Webster and the opinions of Marshall.

Paine had before him a bank charter; Marshall, a college charter; the one had been granted by the State of Pennsylvania, later also by an act of Congress (Dec. 21, 1780); the other had been granted by George III in 1769, the State of New Hampshire, after the Revolution, succeeding to the rights and obligations of the Crown.

A little of the history of the bank

charter is both pertinent and interesting.

On May 28, 1780, Washington at Morristown wrote his "gloomiest letter," addressed to Joseph Reed, President of the Pennsylvania Assembly, of which Paine was Secretary. It fell to him to read it aloud:

"I assure you every idea you can form of our distress will fall short of the reality. There is such a combination of circumstances to exhaust the patience of the soldiery that it begins at length to be worn out, and we see in every line the most serious features of mutiny and sedition."

In the midst of the "despairing silence" which followed, a member of the Assembly arose: "We may as well give up first as last."

Not so with Paine. The treasury was nearly empty, but there remained enough to pay him his salary of \$500, as Clerk. With this, he headed a subscription list for the entire amount. His act "spread like wild fire." 300,000 pounds were raised, with which the first bank in the United States was started to aid the army through the campaign. The *Bankers Magazine* rightly states that the Bank of North America at Philadelphia is admitted to be the first bank in the United States, but that it is not generally known that Thomas Paine is the man in whose brain the bank was born and that he was the first subscriber to its stock. To be the first subscriber to the first bank in the country is just another of the score, and more, of "first" that have been credited to this quite unknown man.

It was the charter of this first bank which was under attack when Paine wrote his *"Dissertations."* It is but

natural, therefore, that he should have had deep sentimental reasons for coming to its rescue to save its charter from repeal, but likewise he was no doubt moved by a patriotic impulse, for above all things Paine was a patriot.

For the purposes of this paper, it will be convenient to give first, upon each point, the reasoning of Paine, and the principles, both legal and otherwise, which led him to the conclusions reached; and then to follow his statements with those of Webster and Marshall contained in the Dartmouth College Case.

Taking up, then, the statements of Paine, Webster, and Marshall, as they are pertinent to the Dartmouth College Case, we will compare them in the following order:

1. *History:* Paine pointed out more in detail some of the facts in the history of the Bank of North America, and then added:

"Thus arose the bank—produced by the distresses of the times and the enterprising spirit of patriotic individuals."

Webster, in his argument, and Associate Justice Story, in his concurring opinion, both referred specifically to bank charters in support of their reasoning, so that Paine's arguments were equally pertinent to the case involving a college charter.

2. *Parties:* Paine declared that:

"The principals, or real parties in the contract, are the State and the persons contracted with." (The subscribers to the bank's capital.) "The charter of the bank, or what is the same thing, the act for incorporating it, is . . . a contract, entered into, and confirmed between the State on the one part, and certain persons mentioned therein on the other part."

Webster stated:

"The charter is a charter of privileges and immunities; and these are holden by the trustees expressly against the State forever."

Chief Justice Marshall declared:

"This is plainly a contract to which the donors, the trustees, and the Crown (to whose rights and obligations New Hampshire succeeds) were the original parties."

3. *Corporate Purposes:* Paine wrote:

"The purpose for which the act was done on the part of the State is therein recited, viz., the support which the finances of the country would derive therefrom."

And then he gave the results of the incorporation of the bank:

"The sudden restoration of public and private credit, which took place on the establishment of the bank, is an event as extraordinary in itself as any domestic occurrence during the progress of the Revolution."

Marshall held that Dartmouth College was:

"an eleemosynary institution, incorporated for the purpose of perpetuating the application of the bounty of the donors, to the specified objects of that bounty."

4. *Consideration:* Paine based the consideration for the charter to the bank upon mutual, or reciprocal, obligations, and their performance by the parties to the charter:

"Those individuals (the stockholders) furnished and risked the money, and the aid which the government contributed was that of incorporating them."

Marshall pointed out considerations similar in kind, that: "large contributions have been made for the object," declared to be literary and educational; that "the charter is granted, and on its faith the property is conveyed;" that "it is a contract made on a valuable consideration. It is a contract for the security and disposition of property. It is a contract, on the faith of which real and personal property has been conveyed to the corporation."

5. *Other Considerations:* A test which Paine used, by which to determine whether the charter was a con-

tract, and which identical test Webster used in his argument, was put by Paine as follows:

"That this is a contract, or a joint act, is evident from its being in the power of either of the parties to have forbidden or prevented its being done. The State could not force the stockholders of the bank to be a corporation, and therefore, as their consent was necessary to the making of the act, their dissent would have prevented its being made; so, on the other hand, as the bank could not force the State to incorporate them, the consent or dissent of the State would have had the same effect to do, or to prevent its being done; and as neither of the parties could make the act alone: but this is not the case, with a law or act of legislation, and, therefore, the difference proves it is to be an act of a different kind."

Webster, seeking to clinch his argument conclusively, used identically the same reasoning as did Paine:

"In the very nature of things, a charter cannot be forced upon anybody. No one can be compelled to accept a grant."

And again:

"What proves all charters of this sort to be contracts, is, that they must be accepted, to give them force and effect. If they are not accepted they are void."

Certainly that was a complete endorsement of the point made by Paine.

6. Conclusions as to the Contract Issue: After developing the reasons given above, Paine declared:

"Here are all the marks and evidences of a contract: the parties, the purport, and the reciprocal obligations."

Chief Justice Marshall, following his process of reasoning, held:

"It can require no argument to prove, that the circumstances of this case constitute a contract."

Again:

"Surely, in this transaction every ingredient of a complete and legitimate contract is to be found."

7. Legislative Power to Repeal: Paine advanced this theory: He

divided laws of the legislature into two kinds: those which pertain to all the people alike and those which are special and pertain to certain individuals only. He classified them as "legislative acts" and "acts of negotiation and agency," the latter being those only in which the legislature acts merely as the agent of the State, or the whole people, in completing State contracts with private individuals.

Webster, on his part, followed quite the same line of reasoning on this point:

"Other civil corporations are for the advancement of trade and business, such as banks, insurance companies and the like." "These are created, not by general law, but usually by grant. Their constitution is special. It is such as the legislature sees fit to give and the grantees to accept."

Clearly there was the same thought of negotiation emphasized by Paine.

8. A Judicial, Not Legislative, Function: Paine insisted that the issue was one of judicial and not legislative import:

"If any difference or dispute arise afterward between the State and the individuals with whom the agreement is made respecting the contract, or the meaning, or extent of any of the matters contained in the act, which may affect the property or interest of either, such difference or dispute must be judged of, and decided upon, by the laws of the land, in a court of justice and trial by jury."

Webster made this his main point, thus agreeing with Paine on the "exceeding great magnitude" of the question presented. Albert J. Beveridge, in his *"Life of John Marshall,"* in the fourth volume thereof, devotes an entire chapter to "The Dartmouth College Case," in which he states:

"It will be perceived by now that Webster relied chiefly on abstract justice. His main point was that, if chartered rights could be interfered with at all, such action was inherently beyond the power of the Legislature and belonged exclusively to the Judiciary."

Beveridge, it is interesting to note, declared further:

"Webster, as we have seen, had little faith in winning on the contract clause and was nervously anxious that the controversy should be presented to the Supreme Court by means of a case which would give that tribunal greater latitude than was afforded by the 'stunted jurisdiction' of which Story complained."

Webster went equally as far as Paine in stressing the importance of this point. He contended that even without the "contract" clause in the Constitution, still the legislative acts in question were not binding, because "not the exercise of power properly legislative;" that their object and effect was "to take away from one, rights, property, and franchises, and to grant them to another;" that this was "not the exercise of legislative power;" that "to justify the taking away of vested rights, there must be a forfeiture;" and that "to adjudge upon and declare which, is the proper province of the judiciary."

9. "*Retrospective*" Legislation: Upon this point, as upon all the others, Paine and Webster harmonized. Paine declared that the repealing act in the bank matter would be "retrospective," and, therefore, invalid. "No law made afterwards can apply to the case, either directly, or by construction or implication; for such a law would be a retrospective law, or a law made after the fact, and cannot even be produced in court as applying to the case before it for judgment."

"That this is justice, that it is the true principle of republican government, no man will be so hardy as to deny. If, therefore, a lawful contract or agreement, sealed and ratified, cannot be affected or altered by an act made afterwards, how much more inconsistent and irrational, despotic and unjust would it be, to think of making an act with the proposed

intention of breaking up a contract already signed and sealed."

Webster, arguing to the same effect, declared:

"These acts must be deemed retrospective, within the settled construction of that term. They violate property. They take away privileges, immunities, and franchises. They deny the trustees the protection of the law; and they are retrospective in their operation."

10. *Successive Legislatures without Power to Repeal*: Paine argued, as did Webster, that successive legislatures had no power to undo "agency" or "contract" acts of prior legislatures; that to permit this would be to grant to the agent the power to override the principal; that since the State is bound on the one part, and the individuals to whom the charter is granted are bound on their part, "the performance of the contract, according to its terms, devolves on successive legislatures, not as principals, but as agents."

"Therefore, for the next or any other assembly to undertake to dissolve the State from its obligation is an assumption of power of novel and extraordinary kind. It is the servant attempting to free his master."

"If corporate bodies are, after their incorporation, to be annually dependent on an assembly for the continuance of their charters, the citizens which compose those corporations are not free."

Chief Justice Marshall in the Fletcher Case, took identically the same position Paine had taken, and made the same kind of distinction, when he declared:

"The principle is asserted, that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of succeeding legislatures. The correctness of this principle, so far as affects general legislation, can never be controverted. But if an act be done under a law, a succeeding legislature cannot undo

it. The past cannot be recalled by the most absolute power."

11. "*Natural Reasons*," "*Fundamental Principles*:" After exhausting the legal arguments at his command, he turned to others, which he declared to be "common sense." He wrote:

"Besides the constitutional and legal reasons why an assembly cannot, of its own act and authority, undo or make void a contract made by the State (by a former assembly) and certain individuals, may be added what may be called the natural reasons, or those reasons which the plain rules of common sense point out to every man."

Here again, Webster joined with Paine by insisting that the acts in question were "against common right." Frankly admitting, of course, that the sole issue before the Court was whether or not the acts were "repugnant to the Constitution of the United States," he nevertheless urged that "it may assist in forming an opinion of their true nature and character, to compare them with those fundamental principles, introduced into the State governments for the purpose of limiting the exercise of the legislative power, and which the constitution of New Hampshire expresses with fullness and accuracy."

So far did Webster go with this "aside" argument, that he even hit on one of Paine's hobbies, the "social

compact theory," which was prevalent in both Europe and America in his day, pursuant to which the people among themselves act to bind themselves as the source of their own government. Webster, pursuing this point, quoted from James Madison that "laws impairing the obligations of contracts are contrary to the first principles of the social compact, and to every principle of sound legislation."

Perhaps, we may find sufficient explanation of Paine's marvelous ability to foresee and set forth, long in advance, the legal principles involved in the Dartmouth College Case, by recalling Madison's estimate of Paine's book on "The Rights of Man." He declared that "'The Rights of Man' is the exposition of the principles on which the government of the United States is based."

Jefferson wrote to John Adams that "Mr. Paine's principles . . . were the principles of the citizens of the United States," and to James Monroe: "I profess the same principles."

Query: Is it possible that John Marshall, who was a friend of Paine and who led the fight (with Washington) in the Virginia Assembly, to reward Paine, may have been familiar with his "*Dissertations*?" Likewise, Daniel Webster?

DID YOU BITE?

HE had a letter from a friend at Julesburg who had suffered a serious personal injury and needed a lawyer. All the local attorneys were afraid of the soulless corporation, guilty of the tort. His friend had heard of me (hurrah) and wanted my friend and caller to see me and learn whether or not I would take the case.

He was going to Julesburg the following Sunday to bring my near-client to Denver for a consultation. I opened my desk book and noted the engagement—"2:30 P. M. December 20th." Business! Damages \$5,000.00. Expense \$75.00, Net \$4,925.00. My split \$2,462.50!!

He had opened the office door. Then he remembered! "By the way," he said, in broken English, as he closed the door and turned back to my desk. "I will need gas and oil for that trip to Julesburg. I have just \$2.00 and wondered if you could let me have \$2.50 to make out my expense." I didn't bite. Did you?

N. O. SUCKER

—Denver Dicta.

AN UNCONVENTIONAL JUDGE

By THOMAS J. KNIGHT

COMMISSIONER OF THE JEFFERSON CIRCUIT COURT, LOUISVILLE, KY.

(Condensed from December, 1938, Kentucky Bar Association Journal)

THE bench and bar in Kentucky have throughout their long history been adorned with many interesting personalities. Especially was this true in the older days of the circuit riding judges and the lawyers who followed them from county seat to county seat in those pioneer days. But with the advent of changed conditions of transportation, industrial development, widespread education, and changed methods of training members of the legal profession, the picture has changed. The so-called "good old days" have been replaced by a more conventional method of doing the things that were once done in a more picturesque way. Gone from the bar are those colorful lawyers whose wit, oratory, and all around showmanship drew people for miles to hear them and see them cross swords in some famous trial. Gone are the judges who presided at those trials and the appellate judges of the Judge Guffey type who reviewed their work. In their places have come more highly trained, better equipped, but less colorful lawyers and judges now engaged in the solution of intricate business, social and financial problems: the lawyers often building up a successful practice without engaging in any actual trials of cases.

As a result of this, much of the former glamour that hung around the legal profession is gone; both lawyers and judges have become conventional, poured into and out of a common mold as it were, and have lost largely the individuality and personality which formerly characterized members of the profession.

Occasionally, however, there does

spring up from among the judiciary a judge of an unusual type who, for want of a better term, could be called a non-conventional judge; whose opinions are not written in the usual stereotyped form with which the lawyers are familiar, but whose opinions add spice and lighten up the somewhat dry and prosaic field of the law.

Such a judge was Judge Wana-maker, of Ohio, who a decade or so ago was widely quoted even in non-legal publications because of the unique character of his opinions and the poetic philosophy which made them interesting to the layman.

Such a judge is Hon. Churchill Humphrey now judge of the First Chancery Branch of the Jefferson Circuit Court. His decisions have perhaps been more widely quoted and more freely discussed by the lawyers at this bar than any judge who has ever sat on any of the branches of the Jefferson Circuit Court.

Judge Humphrey enjoyed a wide and varied experience before coming to the bench. In the first place he had the advantage of a splendid classical education which familiarized him with the best in the world's literature and which as the result of a retentive memory he seems to have available to draw on when needed. In the second place he had the advantage of the thorough education given at the United States Naval Academy, of which he is a graduate, and of the traditions of the sea and of the Navy in which he served during the World War. In the third place, through association with his father, a former chancellor and for many years the leading lawyer at the Kentucky Bar, he became

steeped in the traditions and the lore of the ancient chancery practice.

It is from these three sources that he draws liberally in his decisions and it is his numerous references to nautical terms and ancient chancery law, together with quotations from literature,—principally Kipling and Shakespeare,—and from the Bible that embellish his opinions and make them stand out as somewhat unique in a field of conventional judicial opinions. With a well-developed sense of humor he often sees the funny side of a situation and relieves the tedium by the use of some humorous but appropriate quotation; he often refers in his opinions to "my own flippant style of expression," or to the phraseology of his opinions as "colloquial" rather than conforming to the customary language of judicial opinions.

As illustrating his unconventional approach to a subject is an opinion which he wrote in a case involving the construction of a will. From time immemorial judges in construing wills have said in their opinions something like this:

"The polestar in the construction of a will is to ascertain the intention of the testator from the four corners of the instrument."

Judge Humphrey approaches the subject this way:

"Polaris. We start with Polaris. No happier figure of speech could have been chosen—maybe it was by accident—that the polestar rule, later corrupted to polarstar rule; *i. e.*, intent of the testator as gathered from the four corners of the instrument and from the circumstances under which the instrument was executed. But the trouble with this pole or polarstar rule is that it is—like its astronomical prototype, Polaris—just a little out of line. If the line of the earth's axis actually skewered Polaris, the women would go to sea; for in practical navigation, chronometers, spherical trigonometry, logarithm, nautical almanacs, irate skippers and rattled navigators could go into the limbo of useless appendages; and any man, woman, or child who could read a sextant could

direct the courses of the greatest armada. So with the pole or polarstar rule, its application is an art, and not a science; yet there it is; it's all we have got; it must be applied. So the best I can do is study this will, make up my mind what the testator intended; and—because of the quaint situation wherein my thoughts are law—or strictly speaking *ad interim* interpretation of the law—record those thoughts to be crystallized into a judgment whose frail and brittle composition will endure or be shattered depending upon the parallelism or divergence of the composite thought of those senior in the judicial hierarchy. So let it be."

In another case involving alleged usury arising out of a contract in which the party seeking to recover usury made a great deal of the fact that his adversary took the initiative in inducing him to enter into the alleged usurious contract, Judge Humphrey held that it is the contract itself that counts, not which party initiated the negotiations leading up to it and illustrated his point by the following example which I think he has always regarded as his prize contribution to legal literature:

"Take for example the contract ending in the status of marriage: Bernard Shaw—probably taking his cue from the fact that Eve started the trouble in the Garden of Eden—says that the husband-hunting woman is the most terrible of all beasts of prey; Walter Scott, on the other extreme, paints Rowena a damsel so frigid that a hardy youth named Ivanhoe, had to commit mayhem in the lists of chivalry to attract her attention; had to engage in guerilla warfare to get a word with her, had to chase her through a deep moat, climb after her over crenelated walls of a fortified town, run her up the steep steps of the citadel, and finally shoo her into the angle made by two excarpements before he could pin her down to a serious talk about the facts of life; Edgar Rice Burroughs takes a median: he has Tarzan—really the Mowgli of Kipling—a glorious young male of the genus *homo sapiens*, who could pull off the ears of a saber toothed tiger with one hand while he tied a boa constrictor into a running bow line with the other to lasso a hairy mammoth—at the same time kicking the gizzard out of an aurochs and blinding with tobacco juice the eyes of a great bustard.

Edgar Rice Burroughs has Tarzan swinging from a vine in the cool of an African jungle and just naturally swinging into Jane, a female of his own genus, and afterwards has Tarzan telling his grandchildren: "And so it was I won your gentle little grandmother."

"Now suppose Eve, Rowena, and Jane, filed their several suits in the Jefferson Circuit Court for divorce on the grounds of cruel and inhuman treatment; Eve alleging a common-law marriage according to the customs of Mesopotamia; Rowena filing as an exhibit a marriage certificate signed by the Archbishop of Canterbury; and Jane insisting on judicial notice of marriage by the laws of the jungle, or by what Grotius expounds as the law of nature. Suppose Eve testified that Adam cursed her in the presence of her friend the Serpent; Rowena testified that Ivanhoe cracked her one with his mace; Jane that Tarzan slept all day and then, instead of taking her out in the evening, did his nocturnal grapevine swinging alone—or as he claimed alone. Would the judicial approach be different because Eve originally incited Adam, Ivanhoe originally incited Rowena, and as between Tarzan and Jane, it just happened? I think not."

In another case involving the question of whether Louisville's Zoning Ordinance is a public law or merely a public record he had this to say:

"Issue: Now if Zoning Ordinance be a public law, I do not see how plaintiff has a leg to stand on; but if Zoning Ordinance be merely a public record, then I see how plaintiff has got two good legs not only to stand on, but also to walk all over defendant."

"Considerations: Public Law: Imagine an auctioneer armed with Blackstone, Dembitz on Land Titles, Kentucky Constitutions, Kentucky Statutes, Opinions of the Court of Appeals, opinion of local conveyancers who, as far as my judicial experience goes, never agree on the application of anything in Blackstone, Dembitz, Constitution or judicial opinions; imagine that auctioneer, obligated to expound and explain all of the public laws under which lots No. 45 and No. 11 would necessarily be held and enjoyed by the purchaser. He might start in the Tigris-Euphrates valley with the code of Hammurabi; carry this over to Greece; follow through the Roman Law; chase old man Justinian through the pandects to fetch up with the discovery by Niebuhr at Verona of the last Institutes of Gaius. He might follow through the canonist and in-

corporate the Mosaic Code into the Civil Law. He could then stand at the Battle of Hastings with William of Normandy while the Bastard moved in and took over Harold the Saxon; trace the rise and decline of feudalism through Blackstone; take on Dembitz and finally arrive at what my friend F. B. W. calls the Sanhedrim at Fifth and Court, presided over by high priest P. N. He might do all this; but I venture the assertion that did he do so, his potential purchasers would fall from him like 'leaves in the forest when summer has flown.'"

Probably the most famous quotation from Judge Humphrey's opinions is in what I have always called his "bumble bee" decision. This was a case in which the plaintiff sued a quarrying company for damage done to his house by blasting in defendant's near-by quarry. Experts from the powder company testified that the blasting was properly done and it could not possibly damage plaintiff's house, whereas the plaintiff's testimony showed that his house was actually being damaged by the concussion or jar incident to the blasting operations. Judge Humphrey held that regardless of the theory of the defendant's experts that no damage could result, the fact remained as shown by the proof that damage did result from the blasting—saying the best test of cause is the effect and used this illustration to clinch his point:

"I remember an aerodynamic lecture by a recognized authority whose bluntness and wit made for clarity. Speaking of the fallibility in projecting flight performance by instrumental test he said: 'Take the bumblebee. Apply to him the recognized aerodynamic tests. From the size, shape, and weight of his body in relation to total wing area, he cannot possibly fly. But the damned fool does not know this; and he goes ahead and flies anyway.' Results, though not infallible, are the best test."

Most every judge at some time in his career has railed against the law's delay and Judge Humphrey is no exception; as usual, his references to it have been couched in language containing many literary references. In

a case which he decided in which there has been a long delay resulting from legal battle of opposing counsel he said:

"Sometimes I think Hamlet was right when he put 'the law's delay upon a parity with the pangs of despised love,' . . . the insolence of office, and the spurns that patient merit of the unworthy takes. . . ."

"In this battle of books, case after case has been cited, examined, explained, invoked, distinguished. Perhaps, in:

"That codeless myriad of precedent,
That wilderness of single instances,
Through which a few, by wit or fortune
led,
May beat a pathway out to wealth and
fame,"

"I may arrive at the justice of this cause. I hope so. Anyway, I will try."

And in another case which had been pending in the courts of his predecessors for several years he wrote:

"Dickens, in his novel 'Bleak House,' created the famous case of Jarndyce v. Jarndyce. In so doing he forecast the sea warfare of 1914-1918 when in fiction he launched the Nautilus. Jarndyce v. Jarndyce came to an abrupt end when the costs of litigation wholly consumed the estate in equity administration.

"A very little money remains in court to be distributed by final decree in the case before me. The litigants are in dire need. Is it possible to resolve their rights before their strife destroys the bridge they all count on to carry them across? That is my task, and I will meet it to the best of my ability."

In some of the most prosaic cases in which the usual judge would never find anything of interest, Judge Humphrey finds situations to appeal to his humorous side or to make the basis of some historical or classical reference. For instance, in a case involving the conditional sales contract of a truck, he wrote:

"Emerson, in his Essay on History, suggests that no one can understand history until he has lived history; *i. e.*, that the lifeless narrative of past events can be vitalized only by the spark of a similar or analogous personal experience. He is right. For in offering this opinion I now

understand—and for the first time—exactly how the mountain felt who labored and brought forth a mouse.

"In considering this case I had hoped to codify the Kentucky law governing the enforcement of installment sales contracts. But 'the worldly hopes men set their hearts upon, turn ashes' (Omar Khayyám). But this would involve more time than can be allotted to this case. Therefore, I cannot presently enter the lists; and the lances I had prepared to break with Blackstone, Kent, Benjamin, and Williston, must rest for the nonce unbroken."

And in a case involving the financing of installment sales he found a parallel in the Mother Goose rhymes and, in reviewing the incidents of such sales, said:

"It is like a familiar chain. Starting with the installment sale, sooner or later the courts will have to consider the whole economic edifice reared thereon. Remember 'The House that Jack Built?'"

"This is the farmer sowing the corn

That kept the cock that crowed in the morn,

That waked the priest all shaven and shorn,

That married the man all tattered and torn,

That kissed the maiden all forlorn,

That milked the cow with the crumpled horn,

That tossed the dog,

That worried the cat,

That killed the rat,

That ate the malt,

That lay in the house that Jack built.

—Mother Goose."

And in a case in which the attorneys sought by a short cut in their practice steps to throw onto the judge detailed work that should be done by the Receiver and the Commissioner, he said:

"Now I am just one of the three, to-wit, a judge. The Babs Ballads recorded the proceedings in the British Court of Admiralty. Investigation was had into the loss of the brig 'Nancy.' The sole survivor under examination asked to state his name, rating, and present station, replied (according to Babs Ballads) as follows:

"I am the Captain bold

The crew all told

The mate of the Nancy, brig,

I'm the boatswain, tight
And the midshipmite
And the stroke of the Captain's gig."

When called on to explain why he held so many incompatible offices, he replied substantially as follows:

"The brig 'Nancy' was wrecked on a desert island. Short of food they all drew lots and ate each other. As the sole survivor he had eaten part of all, consumed those who had eaten the other parts. Ergo, there survived in him the whole of the officer personnel and ship's company."

Many other interesting quotations like those above referred to can be found scattered throughout Judge Humphrey's opinions, but to analyze the cases and quote from them fully would unduly lengthen this article. I am, therefore, collecting in a sort of hodge podge some typical expressions of Judge Humphrey; also some quotations used by him which I have garnered from some of his opinions:

On human rights:

"Human rights have never been susceptible of exact metric standards. There is no centimeter, gram, second system in human relationship that

"Can whittle the trunk of the Eden tree to the shape of a surplice peg

Or bottle the fate of our parents twain in the yolk of an addled egg.

—Kipling."

When finding himself in a dilemma:

"That is the record before me, and when confronted with this two-horned dilemma, I wonder whether Aristotle's 'Deductive Logic' has not given way to Hemingway's Death in the 'Afternoon' (it is afternoon now—I have been working on this case all day). Now all of this is ridiculous. It reminds me of Crogate's case and 'Absque hoc' of negatives pregnant, and anticipatory replications, and such like things concerning which I used to marvel at Law School without the least understanding or even sympathy. I can picture a lot of special pleaders in old man Chitty's office getting into such a tangle of suppressed desire and excitement over the state of this record that Freud himself could not straighten them out.

"As a practical proposition the court, on its own motion, is going to set this case

down for next Tuesday, at which time I will dispose of it by hewing to some kind of a line, letting the chips fall where they will.

"If it were done, when 'tis done, then 'twere well

It were done quickly.

Macbeth, Act 1, Scene VII."

For a little burst of eloquence unusual in his opinions:

"Courts act on precedent. But in all the galaxy of precedent there stands out one constellation, most brilliant of them all, the maxims of equity. And the court sets and steers its course by a star of the first magnitude in that constellation, the maxim 'Equity is equality.'"

Also

"We know that sex paints the wings of the butterfly, colors the plumage of the bird and brings out the prismatic tint of the seashell. We, therefore, must realize that sex is part of us."

Concerning numerous amendments to pleadings:

"H. G. Wells, in his 'Outline of History' pictured the great westward migrations into Europe as originating in a black storm cloud of population hovering over central Asia and constantly raining down peoples into a land already surfeited with human life. I wish I had H. G. Wells' graphic pen just long enough to picture the amended pleadings that are migrating into this record."

On lawyers' sloven pleadings:

"This is a case in which simple transactions are pleased in extenso by copying into the petition long documents. Nowhere in the code nor in the hard won victories of the courts throughout the centuries do I find where a litigant through counsel is permitted to hand a nisi prius judge a bundle of long, complicated, and wearisome legal documents with the cheery suggestion: 'Take these, old fellow, and study them. See if you can make anything out of them; obviously, from my pleading, I cannot. When you get through, write me an opinion, and if you cannot find anything in the first batch justifying judgment for my client, let me know and I will dig up some more.'"

Also

"The pleadings in this case are summarized by a line in one of Eugene O'Neill's

plays—"The Long Voyage Home." After rounding the Horn a little cockney sailor is in a London grog shop. Being lonesome, he calls for girls. The girls are sent for; and as they stand simpering in the doorway, the little cockney rouses from a drunken stupor to exclaim: 'Gor blime! Ain't they 'orrible!' That's what I think of these pleadings."

Complimenting a lawyer on his good pleading:

"This is a case unique in my judicial experience. From the pleadings it is possible to tell what the parties are litigating about. Not only are the pleadings informative; they also are short. Plaintiff states his case in two typewritten pages. . . . In my two years' judicial experience in which I estimate conservatively that I have examined some 7,500 to 10,000 pleadings, this petition is tops. It pleads the case in good English without undertaking to combine pleading, evidence, argument, and brief. Whoever drew it is a lawyer. Were I King of England I would make plaintiff's counsel a knight. Defendant states his defense in two typewritten pages. His counsel also would be a knight, if I were king."

In a case bearing some evidence of fraud:

"O. Henry gave one of his books the title 'The Gentle Grafter.' I wish O. Henry were alive to write this opinion. Defendant was persuaded to sign an accommodation note by a technique so exquisite that its description is worthy the pen of a master."

As to importance of litigation in the eyes of litigants:

"The Chronicler Baghot says: 'World problems are but small town differences—magnified.' It will not offend the litigants by classing their contentions as 'small town differences.' On the other hand I will not regard them as 'world problems.'"

In a case involving novation:

"There is no magic in the term novation. Abracadabra invoked the devil in the form of a broomstick to drown in ale the thirsty monk in St. Dunstan's Tower. But that was by force of incantation. Novation is not incantation: it's a substituted contract."

On the duties and obligations of the judicial office:

"One delightful phase of judicial office is the childlike wonder that may be indulged in the Punch and Judy show (record), without the obligation, or even right to look behind the scenes (go dehors the record); to find out if the crocodile really does swallow the deputy sheriff."

Also

"I have read them all from Lord Chancellor Bacon to Dean Pound. The only one that impresses me as having the right idea of the obligation of a judge is Lincoln. Lincoln said that 'we shall hold to the right as it is given to us to see the right.' As I see the right, this boy ought to be with his mother. I so hold."

Also

"If judges are to sit idly by and see justice miscarry just because defense is more skillful in practice than offense, then we should, in my opinion, abolish the office of judge. But today, at long last, judges are beginning to renounce the servile status of referee between lawyers and are beginning to reassume the office of dispensers of justice between litigants. And Code 114 points the way."

On the discretion of the chancellor:

"The discretion of a chancellor (like Southern cooking) is grossly overrated. Undoubtedly Mr. Justice Blackstone (Sir William himself) states: 'It has been said that a court of equity is not bound by rules or precedents, but acts from the opinion of the judge founded on the circumstance of every particular case.' 111 Book 432 (star page). But then Sir William, common law lawyer as he was, went on to point out that 'equitable' (chancery) precedents make up a body of law as inflexible as the common law proper. . . . Personally I cannot see the chancellor in the role of wet nurse to an intelligent, educated male adult."

On a case involving close construction of a statute:

"We know what Heaven or Hell may bring,
But no man knoweth the mind of the King."
Ballad of the King's Jest.

—Kipling.

"We have to guess. This is my guess."

In a case involving a "debit" purchased from a defunct insurance company:

"Just what is this 'debit'?" Frankly the jargon of a guild is always a bore to encounter. A doctor will never admit that he cuts out a tonsil; on the contrary he insists that he performs a tonsilectomy. An airplane pilot will never admit that he opens the throttle of his engine; on the contrary he gives her the gun. A sailor will never admit that he decreases the effective area of canvas spread to the wind; on the contrary he shortens sail. A mathematician will never admit that he simplifies his calculation by ridding it of an im-

material element; on the contrary he eliminates x. An electrician will never admit that a safety device functions automatically under a dangerous overload of energy; on the contrary he insists that a fuse blows or a circuit breaker kicks out. Finally, no lawyer will tell you that the enjoyment of property does not mean a carnival of hilarity conducted on the premises, but means merely the incidents of immediate and lawful ownership. Well so it goes; now let's get back to this 'debit' business. Let's see if I understand it."

THE DOCTORS

Submitted by Mr. David W. Niesenbaum, Philadelphia, Pa.

Nowadays there's little meaning
For a person to be gleaning
When a man attaches "doctor" to his
name.

He may be a chiropractor
Or a painless tooth extractor—
He's entitled to the title just the same.

Then again he is a preacher
Or a lecturer or teacher
Or an expert who cures chickens of
the pip:

He may keep a home for rummies,
Or massage fat people's tummies,
Or just specialize in ailments of the
hip.

Everybody is a "doctor,"
From the backwoods herb concocter
To the man who takes the bunions
from your toes:

There's the high-brow dietitian
And the snappy electrician
Who shocks you loose from all the
body woes.

He may be so diplomatic
Or a leader democratic
Who prescribes new legislation for
some flaw;
As a G man he's a hummer

Or in music, one swell drummer;
He may learn to be a "doctor" of the
law.

As a movie star romantic:
Literati quite pedantic,
Or a celebrated player in some game:
He might shine your shoes expertly
Give advice on stocks adverbly,
Everybody calls him "doctor" just the
same.

As a president of college,
Or a book-worm with rare knowledge
He may gain the title "doctor" for his
pains:
There are stone-age relic crashers
And the stylish haberdashers,
Who the pinnacle of "doctor" often
gains.

So there's very little meaning
For a sufferer to be gleaning
When a man attaches "doctor" to his
name.
He may pound you, he may starve
you,
He may cut your hair or carve you,
You have got to call him "doctor" just
the same.

—STODDARD KING,
EDWIN M. ABBOTT.

OUR SET OF THE LITCHFIELD LAW SCHOOL NOTEBOOKS

By OSCAR D. CLARKE

LIBRARIAN, U. S. SUPREME COURT

(From the *Law Library Journal*, November, 1938)

WITH many libraries possessing one or more sets of notes of the Litchfield Law School's Lectures, it would be difficult for me to assign a convincing reason for singling out for special comment the set which came to us as a gift with the other volumes constituting Elbridge T. Gerry's very fine law library. This is particularly true because of my almost complete ignorance of the contents of many of the other sets, which may be of much greater interest. The student whose notes we have did answer, however, to the uncommon name of "Clarke"—Henry L., to give it in full—and his home state was New York. But whether or not the possible kinship of author and librarian may be blamed for this brief article, the fact remains that our set does show many departures from the conventional, and after all it is this nonlegal element, rather than the legal, which makes these books attractive, at least to me.

The earliest date recorded in any of the five volumes is April 15, 1827, but as the records of the school show our Henry to have entered in 1826, the course must have been at that time well under way. I do not have information at hand as to the number of students in his class, but it is unlikely that at that time it would have exceeded twenty. We can picture them seated at individual desks in the one-room frame building, listening attentively as Judge Gould slowly, clearly, and with perfect diction enunciated the principles and gave examples of the law as then developed. When it is remembered, though, that the building had no provision for heating, it is with difficulty that we im-

agine the discomfort incident merely to sitting for an hour and a half in the freezing cold of a Connecticut winter, trying with mitted hand and numb fingers to make a complete record of the words of the instructor. Surely the response of any one of these heavily and clumsily clad youths to the word "red" in a word association test—had one been known and given—would have been, not "blood" or "communist," but "flannels." They truly earned and deserved the legal education gained with such hardship.

To make their task even harder, the notes, it seems, were taken down in ink. The first machine-manufactured steel pens had been made only a few years before and, although they may have been in general use at the time these notes were made and transcribed, a lack of uniformity and sometimes of neatness in the always legible and usually flowing handwriting, may be attributed to pen trouble, as much as to the carelessness or indifference of the transcriber. The ink of the period was of course made to endure and, like the paper, put to shame much of the modern product.

As we turn the pages of the well-preserved volumes, the passing glance reveals that some of the contractions, helpful, and perhaps necessary in taking the notes, have found their way into the transcription. The old "y" form of "th" is always used, alone, for "the" and with the addition of "t," "s" and "n" for "that," "this" and "than," respectively. "Could," "would" and "should" are abbreviated to "ed," "wd" and "sd."

Our attention is also arrested when a different handwriting appears; it may be for a single paragraph or sometimes for a page or more. For information concerning the functioning of the school we must look to the letters of those attending the lectures and so it is that we are told that the students were expected to compare their original notes with one another before transcribing them in final form. The portion of a lecture which one may have missed or for any reason failed to take down would be supplied by a friendly associate who had been present or was perhaps more diligent. Our set shows that the missing note was sometimes copied directly into the transcribed lecture of another, and in such cases the name of the contributor would often be appended. So we find that Henry Clarke's notes bear witness to his popularity as well as to the helping hands of:

E. H. B. (Enos H. Barnes, Virginia)
ALEXANDER N. FULLERTON, Vermont
P. S. GARDNER, Warrten, Rhode Island

JOE H. NICHOLS, New York
CHARLES SHAMBURGH, New Orleans, La.

ROBT. H. SPEED, Virginia.

These young men are all identified as members of the school, but we occasionally find the initials or names of others not so listed. We see an instance of this in the initials, "R. J. G.," appearing at the end of one note. A name not conclusively identified is that of "Charles Sherman, New York," which is signed to another donated paragraph. He may be the Sherman with the unusual given name, Elkanah, and the middle initial "C" who entered the school in 1825.

The name "Henry Lynton" is also introduced but, as it has the appearance of penmanship practice interpolated between two paragraphs of a

lecture, we accept it as a disclosure of our Henry's middle name. If this is a warranted conclusion, the same hand may be responsible for other interpolations. Thus, in volume 4, we meet "Booby Snorts, his signature," and in the next volume we are introduced to the "Watermelon Club—Doctor Busby, Doctor Bolus, Shambug alias Porcupine—& Jacko," and just a few pages farther on, three members of the club reappear as "Doctor Busby—Sham-bug alias Porcupine—& Jacko—immortal trio." If we may assume that Henry Clarke was a member of this trio, there remains but one unidentified, for we can make better than a good guess as to a second. Charles Shaumburgh, whom we have already met as a contributor to the notes, must be "Shambug"—a nickname inevitable. Happy trio! United for eternity by bonds of friendship and love of the luscious and colorful watermelon, one may well wish that a contemporary Rudyard Kipling or Owen Johnson could have immortalized your not-to-be-doubted-full-of-fun-and-adventure school careers, even though you do still live for us in these old volumes.

The lectures themselves disclose numerous things of interest, apart from the legal principles which they expound. Various aspects of the marriage relation are touched upon both directly and incidentally. We of this generation are rather concerned with the legality of divorces obtained in other jurisdictions, but, early in the last century, the validity of marriages performed in a state other than that of which the parties were resident, and to which they journeyed with the understood purpose of evading and avoiding the more exacting laws of their home state, still merited some consideration. With "Baron & Feme" as the subject of his lecture, Judge Gould, in remarks on these marriages, states that the "point is now settled by

y unanimous consent of y profession & y public in the affirmative. Tho I don't think there has been any decision determining ys precise point. The frequent excursions to Gretna Green seem to divest y subject of all doubt with y Engh public."

To a later lecture on "Award & Arbitrament" the following note and comment are credited: "Award yt. y parties submitting shall marry is void reason ('tis said) because it is not advantageous!!—Damnable fools—not advans., hah! Hah! J. G. knows not how they can foresee disadvantage—'Damed short-sighted'—I guess. The true reason J. G. conceives is that it is founded on y immorality of compulsory marriages—and their being vs policy!"

In another lecture, this time on marriage settlements, the question was as to the revival of the wife's settlement under certain circumstances. I quote from the notes:

"A lawyer being employed in a case in wh y above qu arose, laid down y rule in the following manner.

'A woman having a settlement married a man with none

The qu was, he being dead

If that she had was gone

'Quoth Sir John Pratt, her settlement suspended did remain

Living y husband, but him dead

It doth revive again.

'Chorus of Judges

Living y husband, but him dead

It doth revive again."

Before leaving this subject of marriage and some of its consequences, there is one other brief note which seems worthy of a short quotation. The particular lecture was once more on the relation of "Baron & Feme" and Judge Gould has pointed out that the husband no longer had the right to chastise his wife. He concludes with this statement: "It was held (aliter) by a late Engh Judge yt y husbd might correct y wife with a stick as large as the thumb. Hence

he obtained y name of thumb Judge." This illustration evidently impressed Henry, for off to the side of the paragraph we find his pen and ink drawing of a thumb.

The pronoun "I" appears in the notes with considerable frequency and in most instances clearly has reference to the lecturer, but sometimes, however, it is a little difficult to determine whether it is he or the transcriber who is meant. Judge Gould is usually referred to as J. G. So it is that we find, scattered through the volumes, expressions of acquiescence, doubt or dissent, such as: "J G thinks properly;" "J G thinks this a great departure from principle;" "But J G says he cannot see the reason for it;" "This is Chancellor Kent's doctrine from wh J G's mind revolts, as he conceives etc." The reference in these quotations is obvious, but, as may have been noticed already, our transcriber seems occasionally to volunteer amused or indignant comment without clearly indicating its extent or source. We find another illustration of this in "Pleading." The note reads: "The Ct of Errors in Connt have altered ys rule (mirabile dictu)!!! deliberately & knowingly, but for what good or sufft reason, I am not aware," and leaves us in considerable doubt as to just who is saying which. In fact, we might say as did Henry, when at the end of a paragraph he expressed his doubt as to whether a gift made in anticipation of death became absolute on the death of the donor or the donee, "I don't know wht. H. L. C."

As might be expected, "Slander" provides some interesting matter. In discussing what language is actionable when a lawyer is its object, the words, "He is as much a lawyer as my old cow!!!" it is said, were so held. This exposition of the law impels our youthful-minded transcriber—it surely could not be the austere Judge

Gould—to say, “(It is here to be observed yt cows are sometimes lawyeresses in y good town of Litchfield! !)” Another phrase held actionable, “He has revealed his clients’ secrets,” inspires this query and answer, “Suppose his client to be a female, wd he be liable? (I think not—John Styles, Esqr.) females have no secrets.”

It does not appear who “John Styles, Esqr.” may have been, but we are glad his name was introduced in time to absolve our Henry from responsibility for such an ungallant interpolation. In fact we rather believe that romance rules the heart and guided the pen of our young man. For how else may we explain the insertion of three lines at the bottom of a page (following a note about auctioneers!) in which he records what would seem to be the titles of four sentimental songs of the day? Set off in quotation marks they are, “The voice of her I love,” “Farewell to thee Araby’s daughter,” “Kate Kearney,” and “Lavender girl.” All, no doubt, merited Henry’s enthusiastic addition—“hussa, hussa, hussa.”

Reverting for a moment to the subject of slander, I also find this: “To call a man a beate headed Justice is not actionable—it is not an office of profit in Engd.” This statement is followed by a discussion as to what may be shown in mitigation of damages, and it is said at one point, “no such general rules, till lately at least, in Engd. . . . But it seems of late y Connt rule is adopted in Engd! !” In the early days of the Republic this was indeed an event worthy of congratulation and four exclamation marks! This same rule, it seems, was

also adopted in 1820 by the “circuit court of the U. S. in N. York, for the first time,” but, remembering England’s acceptance, this did not rate a single “!”

Henry L. Clarke often registered his name or initials after the satisfying word “Finis,” at the end of his recording of lectures on a subject. Almost as often, a more or less successful attempt at its erasure has been made. Then, superimposed upon the remains of his signature, another name, indicative of a new owner, has been written and in its turn scratched or scraped into illegibility. Truly a palimpsest of buried identity and interest, with each succeeding layer resting, like a more modern city, upon the razed or submerged wreckage of a once gay and vigorous predecessor. In fact there is strong evidence to show that this set of notes was passed on more than once to new matriculates. If accurate and complete, they would certainly have saved much time and labor, even though other considerations might have made their use inadvisable. A check of the subjects covered in the five volumes with a list of those said to have been Judge Gould’s course shows at least that the notes are reasonably complete and without substantial variance in the number of subjects.

In conclusion let me refer to an entry under date of August 12, 1827, when, upon completion of his notes to the title, “Mortgages,” Henry gave enthusiastic expression to his pleasure in words in which I am sure you will be glad to join—

“Finis, Hussah!”

HOW ARE THE NEIGHBORS?

I JUST ran across a deed which I thought might interest the readers of CASE AND COMMENT. After describing the property it adds “together with all improvements and impertinences thereunto belonging.”

Contributor: ORVAL HAFEN,
St. George, Utah.

THE "MERE DICTUM"

By ALBERT S. OSBORN*

IT is interesting to surmise how much of law reform and legal progress can be traced back to the humble, unnecessary dictum, that curious and interesting thing developed in the literature of the law. As we know, it is that part of a legal opinion that wasn't necessary, in order to decide the matter in controversy, but was something that the writer wanted to say and said it. These interpolated bits of what often are philosophy and wisdom and seeds of reform are not precedents to be quoted in order to decide later cases, but they often are germinating ideas, planted in among the formal and often dreary statements of the law, that later may blossom and bear fruit.

The unimportance often attributed to the dictum, which thus forced its way in a sort of impudent manner into robed and dignified society, is shown by the fact that when referred to it often is preceded by the belittling word "mere." The word wise would often be more appropriate, and many dull legal reports would be enlivened if every flaming dictum could be printed in red.

A formal definition in the dictionary says, "A dictum is an opinion expressed by judges on points that do not necessarily arise in the case." They are therefore clearly irrelevant, but what a loss it would be if, like irrelevant testimony, they were all stricken from the record! Isn't it fortunate that no higher court can go through and blot out all of this wisdom that, although irrelevant, may be imperishable? Like inadmissible testimony, it may be the best of all.

The dictum on the cold pages of the law is like the little kind aside in humdrum human relations that really makes life worth living. Bits of friendship and of appreciation, like the dictum, may light up a day as the dictum lights up a page. In the dictum the future of the law may be predicted by the inspired writer who is led to say, not merely what the law is, but what it ought to be and is to be.

Discussions of the ownership and disposal of pork and beef, of "shoes and ships and sealing-wax," of houses and of land, make up the great bulk of the printed law, but the poet, the philosopher and the prophet, hidden in back of even the legal mind, is not completely buried under this great mass of worldly stuff, and occasionally there shines forth in a living dictum that which lights a fire that does not go out. Even in the law an idea may lead to a revolution. The dictum is thus a little lantern that guides the footsteps of the followers of the trail-blazers. Many of these spontaneous pronouncements, that seem almost to have forced themselves into print, point out beyond and above the hard and narrow limits of the law, and make it the living thing that is the basis of all civilization.

It would be interesting to have in a new kind of digest, leather bound and gilt edged, the first dictum and the last dictum and all those in between, scattered through the opinions of certain great judges. These forward-looking truths that were bound to be born would furnish glimpses of the inner man and mark some of the steps on the way up. The best parts of legal biography are quotations of this scattered wisdom and each nugget of thought is much more than "mere dictum."

* Author of *Questioned Documents* (2d ed. 1929), *The Problem of Proof* (1922), and *The Mind of the Juror* (1937).

LADIES AND GENTLEMEN OF THE JURY

(Cleveland Law Journal—November, 1938)

By JOHN A. CHAMBERLAIN

OF THE CLEVELAND, OHIO, BAR

A LAWYER was defending in Court a prosperous and widely known manufacturer. The suit was on behalf of a widow and her six small children. It was claimed that the manufacturer's employee, while driving his employer's car, ran over and killed the widow's husband, and the suit was to recover damages for his wrongful death.

At the trial, the widow brought into Court her six poorly clad children. The truth undoubtedly was that her husband, by his own carelessness, rode his motorcycle into the manufacturer's car and died of the injuries received. But the evidence was just conflicting enough to compel the Court to submit the case to the jury.

After dinner that evening, the manufacturer's attorney went for a walk. Meeting a neighbor, he proceeded to talk about the case he was trying. He related the facts, emphasizing what he believed to be the truth of the controversy, that the widow's husband had carelessly ridden his motorcycle into the manufacturer's car and that the manufacturer's driver was without fault. "If you were on the jury," asked the attorney, "what would you do under the circumstances?" The neighbor replied, "I would give the widow \$25,000.00." "But did I not tell you that it was her husband's carelessness that caused his death?" continued the lawyer. "Oh, yes," was the reply, "but the manufacturer is rich and the widow needs the money. The manufacturer will never miss it."

The next morning the attorney for the manufacturer went into Court and settled the case before submitting it to the jury.

This leads me to inquire, by what

mental process did the neighbor reach his conclusion? He was a business man, well educated, perfectly rational, and less emotional than most men.

One student of philosophy and of the functions of the brain says that the mind is divided into two general parts, the will and the understanding; that man's affection for good, his love, belongs to his will, and that his reasoning powers, his knowledge, belong to his understanding; that a man acts from his will but believes, reasons and talks from his understanding; that the will faculty of the brain, from which a man acts, is stronger than the understanding faculty, from which he reasons; that while men like to think that they act from reason and knowledge of their understanding, as a matter of fact they act from the affections of their will.

A jury might believe, even say, in the case under consideration, that the manufacturer should win, but there is something in their inner nature, an innate sensation or perception that leads them to do what they desire to do even though this is contrary to their understanding. Has the Divine Providence implanted something within us human beings that oftentimes impels us to act contrary to reason? I have heard judges confess that under certain circumstances they have decided cases according to their desires rather than according to their understanding. Are not conclusions often reached from our affections for good, from our love, and argument supplied later to support these conclusions, rather than by using the knowledge we have to reach a conclusion by means of the understanding and reasoning faculty of our minds?



PLAINTIFF'S PROPOSED INSTRUCTION

Contributor: Hon. F. A. Leonard, San Bernardino, Calif.

This accident involves the operation and effect of the natural and physical laws of the universe, that is, the laws of the science of physics.

These laws of the science of physics are known as "the laws of the composition and the resultant of two forces acting at an angle."

The principle or the law of the science of physics applicable to an accident of this kind is stated as follows:

"When two forces act at an angle, the resultant of these two forces is in the magnitude and direction of the diagonal of the parallelogram formed by the two forces.

EULOGY ON MILK

(Extracted from the opinion of Lamm, J., in *City of St. Louis v. Ameln*, 235 Mo. 669, 139 S. W. 429, construing ordinance prohibiting adulteration of milk.)

MILK, an object of profound and vigilant concern to the modern lawmaker, has been always part and parcel of the daily life, the adages, and folklore, of mankind. For example: We are told not to cry over spilt milk; that is, not to fret over real loss that can't be helped. The Russian has an adage: That which is taken in with the milk only goes out with

the soul; that is, early impressions last till death. The Swede has one denoting hospitality, viz.: When there is milk in the can for one; there is milk in the can for two. In the phrase, "the milk of human kindness," is expressed the very heart and office of that gentle but noble virtue.

The bard of bards does not hesitate to connect milk and philosophy. Deeming that neither loses dignity by the juxtaposition, he speaks of "adversity's sweet milk, philosophy."

All such amiable metaphors, saws, similes, associated ideas, and folklore eschew the belittling idea of water in milk; contra, the milk held in mind is good milk. I recall but one instance to the contrary (seemingly the inadvertence of a daring and erratic genius) viz.:

"Oh, Mirth and Innocence! Oh, milk and water!

Ye happy mixtures of more happy days."

Indeed the universal, primal, and spontaneous mental conception we have of milk, in the first instance, is that it is unwatered. Take one case for an example: Milk and honey are emblems of pastoral good luck, peace, and plenty—a large and a goodly land. Witness the phrase, "A land flowing with milk and honey." Ex. iii, 8; Jer. xxxii, 22. But what a derisive picture would rise to harass the imagination by use of the phrase, "A land flowing with watered milk and honey!"

Before THE JUDICIAL GAVEL FALLS

THE JUDGE'S TASK . . .

"The ultimate object of all laws and of all jurisprudence is to do justice between parties; and the judge, who, by patient research and persevering investigation, can unravel a complicated case, seek out its governing principles with their just exceptions and qualifications and without violating the rules or weakening the authority of positive law, can apply those principles in a manner consistent with the plain dictates of natural justice, may be considered as having accomplished the most important purpose of his office."

CHIEF JUSTICE SHAW OF MASSACHUSETTS

THE LAWYER'S TASK . . .

How closely the lawyer's task follows that of the judge!

- 1 Seeking out of governing principles.
- 2 Determining just exceptions and qualifications.
- 3 Application to particular situations.



THE LAWYERS CO-OPERATIVE PUBLISHING CO.
BANCROFT-WHITNEY CO.



THE EDITOR'S TASK . .

The editors of American Jurisprudence in stating the rules of positive law by patient research and persevering investigation unravel complicated cases and seek out governing principles with their just exceptions and qualifications illustrating the subjects with applications.

AMERICAN JURISPRUDENCE

is built in exact harmony with the exacting needs of the judicial process. For this reason its increasing popularity as a modern law office tool is in no small measure due to the care taken in its editorial preparation.

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XUM

We think the ordinance proceeds on the notion that, however much the cow waters her own milk in her humble and honest way (letting nature take her course), the milkman has no right to designedly duplicate nature's gift of water by a furtive gift of his own from the barnyard pump. It proceeds on the underlying theory that it is a fraud, a trick, and a veritable cheat—contrary to the common law, and hence of that phase of it known colloquially as the "square deal"—to sell water, when milk, not water, is the commodity dealt in. If one is not to get a stone who asks for bread, no more (under the spirit of the ordinance) is he to get water who asks for milk.

CORRESPONDENCE WITH A LADY MINISTER

R. D. Robinson

Lawyer

50 S. Cherry St.

Galesburg, Ill., Jan. 25, 1901.

Rev. Miss McDonald,

Urbana, Ill.

Dear Madam:

S. H. Olson & Bro. of this city have placed with me for collection an account against you for \$8.59 for groceries. This matter must be paid at once. Unless the same is paid I will send it Urbana and have it sued.

Yours truly,

R. D. Robinson.

• • •

Urbana, Ill., Jan. 28, 1901.

R. D. Robinson,

Galesburg, Ill.

Your letter received. I admire your way of address so greatly that I cannot refrain from answering you. If it is but to give you permission to sue for a time out-lawed debt. Besides, I defy you to collect a debt from one who has no money and no property. "You can't draw blood out of a turnip." I know you. I had a little conversation with you once, and I have owed you a grudge that has been unpaid and but not forgotten. I wish I had you here long enough to tell you

what I think of you and your methods. You would lose a little of that complacency that is your chief characteristic.

I usually pay my debts but I never pay them twice, and as this one is already paid once, you had best spare your most heroic efforts for a more worthy cause.

Yours very respectfully,

Edna M. MacDonald.

• • •

R. D. Robinson

Lawyer

50 S. Cherry St.

Galesburg, Ill., Jan. 30, 1901.

Rev. Edna M. McDonald, D.D.,

Urbana, Ill.

Dear Edna: Your loving, Christian letter of Jan. 28th received and you certainly display a character and spirit much similar to that of our beloved Saviour. I am glad that you could not refrain from answering my loving letter. I appreciate the permission you grant me to sue, and beg to assure you that the debt which I am now asking you to pay is not outlawed. I have been defied in days gone by, by as handsome damsels as you ever dared to be, but you are about as warm a member as I ever have seen for some time. I do not wish you to understand that I consider you a turnip because I assure you that turnips are rather bloodless articles.

I note what you say about being acquainted with me and having had a conversation with me and that you owed me a grudge. If you are in my debt it is without my knowledge, as I never permit one of the fairer sex to owe me very long. I either collect or cancel the obligation. I have been persistently crowding my memory since the receipt of your gentle letter, trying to recall where I met you, and after careful consideration I have satisfied my mind as to where it was. It was during the World's Fair I met you in the Pabst Beer Casino. I remember of having taken several drinks with you. At least you must be that lady as the only lady I ever met by the name of McDonald I met there under those circumstances, and if you think you met me, that must be the place. I assure you that our little visit on that occasion was very pleasant, sitting as we were over the beer-stein, and I know of no reason why you should have any grudge against me on that account. I did

CASE AND COMMENT

not then dream that the lady with whom I was then drinking would ever be a Universalist preacher. I am sure that the only lady by the name of McDonald that I ever met was the lady that I met there at that time, and I am sure I never met you unless that was the place. Perhaps I might be mistaken, but I think not, and I don't intend nor calculate that you should have any grudge against me, or be in my debt on that account. I assure you I did my best to make things pleasant for you during that short meeting.

You express in your letter a desire to smile upon my countenance long enough to tell me what you think of me. I assure you it would be a great pleasure to meet you once again. My complacency of countenance and actions would be the same then as in the past. If I am possessed of the characteristics of which you speak I assure you that that is no disgrace, and you could not help but have admired it at the time you met me in Chicago.

I note what you say about usually paying your debts. I know nothing about what you "usually" do. Under those circumstances and if that is your "usual" rule, the case which I now have in hand must be an exception to that rule. This is a matter of a bill for groceries that went to satisfy your inner woman and preserve your life "saying nothing about character," during your study for the ministry of God's Holy Writ. I would like very much to, some time in my life, be able to sit in the front pew of your church and hear you expound the Gospels of God to the ever anxious, seeking, God-fearing people of your country. It would afford me great pleasure and might do me some good, especially to have the sermon come from one whose disposition is so sweet, loving and gentle as yours. God certainly marked you early in life for the work which you are now carrying on. I know from the tone of your letter that he must have admired your gentleness and sweet spirit even in childhood.

My efforts to collect this unpaid grocery bill will grow more heroic every time and I trust ere long I will be able to make my standard of heroism along that line so infernal effective that you will settle with your creditors like an honest American, and not proceed on the theory that because you are engaged in the business of preaching the Holy Writ that you are exempt from your legal obligations. If you do not pay this

grocery bill I bespeak much trouble when the last sad end comes to you. I can now see you rapping on the Gates of the Great Hereafter, and I can hear Peter say, "Who's there?" And the reply comes back, "Sweet Edna M. McDonald, a Universalist preacher, from Urbana, Illinois." I hear him say, "Have you loved your flock?" and you reply, "Yes." "Have you taken care to always be kind and courteous to your relations?" And you say, "Yes." I can hear him inquire if you have not sworn, drank or done other evil acts and I hear you answer "No." Then I hear him inquire, "Have you paid S. H. Olson for the groceries that you bought while attending College?" and you are compelled to hang your head in shame and say, "No, I did not pay that honest debt." And then I see Peter with a wave of the hand direct the Grand Bouncer at the Pearly Gates in this language. "To Purgatory with her! She has failed to fill her legal obligations on earth. She might rob Christ if let into Heaven." And then it is that gentle Edna will begin to realize that it had been better for her in her earlier days to have settled with her creditors as honest people ought to do.

Hoping to receive from you by return mail a draft for \$8.59 in payment of this honest little grocery bill, I have the honor to remain,

Sincerely yours,

R. D. Robinson.

P. S. The flowers that bloom in the spring-time, tra la la la,

Have nothing to do with this case, te he, ha ha.

Please remit.

Sincerely yours,

R. D. Robinson.

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407 W. Elm St., Urbana, Ill.,
Feb. 1st, 1901.

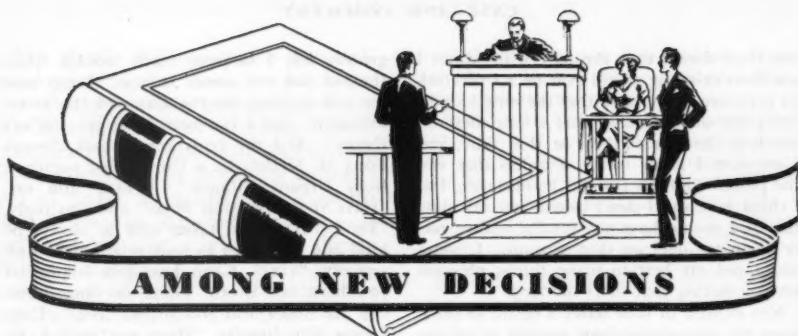
Mr. R. D. Robinson,
Galesburg, Ill.

I have said to myself a dozen times that my letter to you was the coarsest, most unlady-like letter I ever wrote. I am very sorry I wrote so. Will you please accept my apology? The debt is really paid. I think Mr. Olson will tell you so if you ask him now.

Yours truly,

E. M. MacDonald.

Twenty-seven



"And/or" — construction of. In *Davison v. F. W. Woolworth Co.* 186 Ga. 663, 198 S. E. 738, 118 A.L.R. 1363, it was held that where the word combination "and/or" occurs in ¶ 50 of § 2 of the General Tax Act of 1935 (Ga. Laws 1935, p. 34), which imposes a tax upon electrical contractors, it was the intention of the legislative body that the word "and" and the word "or" are to be used interchangeably, so as to impose the tax provided in said act upon any person who shall engage in installing, repairing, and selling electrical wiring and equipment, or who shall engage in any one of them.

Annotation: "And/or." 118 A.L.R. 1367.

Appeal — claim against decedent's estate. In *Re Burton*, — Minn. —, 281 N. W. 1, 118 A.L.R. 741, it was held that pretermitted grandchild who by contract with the children of testator acquired an interest in the residue of his estate is a party aggrieved by an order of the probate court allowing a claim against the estate, and entitled to appeal to the district court.

Annotation: Who entitled to contest, or appeal from, allowance of claim against decedent's estate. 118 A.L.R. 743.

Argument of Counsel — matters incapable of proof. In *Mudrick v. Market Street R. Co.* — Cal. (2d) —, 81

P. (2d) 950, 118 A.L.R. 533, it was held that the making, by counsel for plaintiff in an action for injuries to a street car passenger alleged to have been caused by the jerking of the car, causing him to fall from the running board, of statements in opening the case to the jury which he did not attempt to prove and knew could not be proved, to the effect that the equipment of the defendant corporation was old and obsolete, that it undermined the operation of its cars at the time and place of the accident, and failed to maintain proper guards to prevent a passenger thrown from a car from going under its wheels, will not be held on appeal to have amounted to prejudicial error where the trial court instructed the jury that there was no evidence that the equipment of defendant's car was not of standard kind and character, and also, upon denying a motion for a new trial, necessarily held that the remarks complained of resulted in no serious prejudice to the defendant.

Annotation: Reference by counsel in opening statement in civil case to matters which he does not attempt to prove as ground for new trial or reversal. 118 A.L.R. 543.

Automobiles — collision on bridge. In *Yance v. Hoskins*, — Iowa, —, 281 N. W. 489, 118 A.L.R. 1186, it was held that in an action growing out of an automobile collision on a bridge, plaintiff's failure to have adequate

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brakes or to apply his brakes in driving down a steep grade approaching a bridge 14 feet wide in sight of defendant's automobile approaching from the opposite direction cannot be said as a matter of law to have contributed to the accident where there is evidence that when he entered the bridge he was going less than 15 miles an hour, that defendant's car was then some distance from the bridge, and that when plaintiff was about two-thirds of the way across with the right side of his car about 6 inches from the bridge railing, leaving room for the approaching car to pass, the approaching car, moving at 25 miles per hour, swung across the center line of the bridge and struck the left front wheel of plaintiff's car.

Annotation: Collision between automobiles on bridge or approach thereto. 118 A.L.R. 1196.

Automobiles — injury by backing truck. In *Johnston v. Johnson*, — Iowa, —, 279 N. W. 139, 118 A.L.R. 233, it was held that plaintiff in an action for personal injuries received when a truck backed against him cannot be said as a matter of law to have failed to establish negligence in the operation of the truck where the evidence shows that after a direction had been given to back the truck up a couple of feet the truck was backed and came almost to a stop within 2 or 3 feet, but instead of doing so lurched backward in such a sudden manner as to force plaintiff backward about 12 feet, crushing him between a brick pile and the rear end of the truck.

Annotation: Liability for damage or injury while automobile is being backed. 118 A.L.R. 242.

Automobiles — watered gas as proximate cause of burning of automobile. In *Spence v. American Oil Co.* — Va., —, 197 S. E. 468, 118 A.L.R. 1120, it was held that negligence of the operator of a filling station in putting

into an automobile fuel tank gasoline containing water is as a matter of law not the proximate cause of damage to the automobile by a fire which occurred when, as the fuel tank was being drained by the motorist's direction, gasoline overflowed the container in which it was being drained and ran into the street gutter, where it was ignited by a lighted match tossed by a passer-by.

Annotation: Negligence in repairing or servicing automobile as proximate cause of subsequent injury or damage. 118 A.L.R. 1129.

Banks — application of deposit on note due bank. In *Amanda Teeters v. City National Bank of Auburn*, — Ind., —, 14 N. E. (2d) 1004, 118 A.L.R. 383, it was held that a bank may not set off a note against a deposit of one of the makers whose actual relation to the transaction was that of surety, notwithstanding the provision of the Negotiable Instruments Act rendering a comaker whose relation to another comaker is in fact that of surety primarily liable for payment of the obligation.

Annotation: Right of bank to apply to debt due from two or more parties, deposit to credit of one of them. 118 A.L.R. 386.

Banks — collections, insolvency of forwarding bank. In *Dean Tobacco Warehouse Co. v. American Nat. Bk.* — Tenn., —, 117 S. W. (2d) 746, 118 A.L.R. 360, it was held that where a check was deposited under an agreement between the depositor and the depository bank that the bank was to act as agent for the depositor in collecting the check, that it might appoint a subagent for the purpose of collection, and that the subagent might discharge its obligation to the depositor by crediting the proceeds to the account of the forwarding bank, and the collecting bank does so credit the proceeds of the check, pursuant

to an arrangement between it and the forwarding bank to maintain reciprocal accounts, the obligation of the depository bank to the depositor becomes absolute, and the collecting bank is not answerable to the depositor for the proceeds of the check upon the supervening insolvency of the depository bank.

Annotation: Arrangement of course of dealing between forwarding bank and collecting bank as affecting relations or rights as between depositor for the proceeds of the check upon the collecting bank. 118 A.L.R. 363.

Banks — *payment of checks on forged indorsement.* In *Bourne v. Maryland Casualty Co.* 185 S. C. 1, 192 S. E. 605, 118 A.L.R. 1, it was held that checks drawn by an administrator in favor of distributees with the fraudulent intent of obtaining the proceeds by forging the names of the payees are deemed made to fictitious payees so as to exonerate the bank on which they were drawn from liability to the decedent's estate for the amount thereof, within the provision of the Negotiable Instruments Law that an instrument is payable to bearer when it is payable to the order of a fictitious or nonexistent person and such fact was known to the person making it so payable; and this notwithstanding the fact that in counter-signing such checks the representative of the surety on the administrator's bond intended that the checks should be payable to such distributees.

Annotation: When negotiable instruments deemed payable to fictitious or nonexistent persons within statute or rule that makes such paper payable to bearer. 118 A.L.R. 15.

Bulk Sales Law — *fixtures.* In *El-liott Grocer Co. v. Field's Pure Food Market*, 286 Mich. 112, 281 N. W. 557, 118 A.L.R. 845, it was held that the transfer of store fixtures is, though not accompanied by a transfer of mer-

chandise, within the operation of a Bulk Sales Law declaring void as to creditors, unless certain specified steps are taken by the parties, the sale in bulk of any part or the whole of a stock of merchandise "or merchandise and the fixtures pertaining to the conducting of said business, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the business of the seller."

Annotation: Fixtures as within contemplation of bulk sales or bulk mortgage act. 118 A.L.R. 847.

Constitutional Law — *removal of officers.* In *Re Opinion of the Justices*, — Mass. —, 14 N. E. (2d) 465, 118 A.L.R. 166, it was held that the power summarily to remove clerks of court where the public good so requires, and to remove registers of probate and district attorneys upon petition, hearing, the showing of "sufficient cause," and proof that the removal is required by the public good, is judicial in that the duties of such officers are intimately connected with the administration of justice; and hence a statute conferring it is not within a constitutional provision that the judicial department shall never exercise legislative or executive powers.

Annotation: Power of courts or judges in respect of removal of officers. 118 A.L.R. 170.

Contempt — *complaint under oath.* In *Charles Cushman Co. v. Mackesy*, — Me. —, 200 A. 505, 118 A.L.R. 148, it was held that the requirement of a statute prescribing procedure for contempt, that the complaint be under oath, is jurisdictional.

Annotation: Necessity of affidavit or sworn statement as foundation for constructive contempt. 118 A.L.R. 155.

Contractor's Bonds — *action by materialman.* In *Bristol Steel & Iron*

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Works, Inc. v. Plank, 163 Va. 819, 178 S. E. 58, 118 A.L.R. 50, it was held that sureties on a bond for the performance of a building contract are liable thereon to unpaid materialmen where the contract obligates the contractor to pay for labor and material, although the bond was executed at the instance of one advancing money on mortgage for the construction of the building.

Annotation: Right of person furnishing material or labor to maintain action on contractor's bond to owner or public body, or on owner's bond to mortgagee. 118 A.L.R. 57.

Contracts — *failure to procure license as affecting enforceability of contract*. In *Rosasco Creameries, Inc. v. Cohen*, 276 N. Y. 274, 11 N. E. (2d) 908, 118 A.L.R. 641, it was held that failure of a dealer in milk to obtain the license required by the state Milk Control Act does not preclude him from recovering the agreed price or reasonable value of milk sold to another dealer where, while the statute makes violation punishable by fine or imprisonment or both, it does not expressly provide that contracts made by unlicensed milk dealers shall be unenforceable, and its primary purpose is not to protect other dealers, but producers and the consuming public, and by its terms dealers who handle less than 3,000 pounds of milk a month and those selling in markets of 1,000 population or less may be exempted from its requirements.

Annotation: Failure to procure occupational or business license or permit as affecting validity or enforceability of contract. 118 A.L.R. 646.

Courts — *jurisdictional amount in labor dispute*. In *Crescent Planing Mill Co. v. Mueller*, — Mo. —, 117 S. W. (2d) 247, 118 A.L.R. 709, it was held that the amount in dispute in an action to enjoin acts in furtherance of a boycott is not shown to exceed \$7,-

500, so as to give the supreme court jurisdiction of an appeal from the decree therein in favor of plaintiffs, by an allegation of the complaint that the business of complainant exceeds annually the amount of \$65,000.

Annotation: Jurisdictional amount involved in suit arising out of labor disputes. 118 A.L.R. 715.

Criminal Law — *incarceration for other offense as affecting speedy trial*. In *Ex Parte Schechtel*, — Colo. —, 82 P. (2d) 762, 118 A.L.R. 1032, it was held that a sovereign may not deny an accused person a speedy trial by reason of the circumstance that he is incarcerated in one of the sovereign's penal institutions under a prior conviction and sentence in a court of that sovereign.

Annotation: Constitutional or statutory right of accused to speedy trial as affected by his incarceration for another offense. 118 A.L.R. 1037.

Discovery and Inspection — *of trustee*. In *Union Trust Co. v. Superior Court*, — Cal. (2d) —, 81 P. (2d) 150, 118 A.L.R. 259, it was held that in litigation between a trustor or beneficiary and a trustee involving the issue of fraud and negligence in the administration of the trust, the ordinary strictness of the rule relating to the right to inspect the books and records of an adverse party is greatly relaxed, and the trustor has, almost as a matter of course, a right to full and complete inspection of all books and records of the trustee relating to the trust.

Annotation: Right of beneficiary or claimant of estate to inspect books and papers in hands of trustee, executor, administrator, or guardian, and conditions of such right. 118 A.L.R. 269.

Divorce — *order to pay wife's attorney*. In *Doench v. Doench*, — Ind. —, 16 N. E. (2d) 877, 118 A.L.R. 1134,

it was held that an order entered in a divorce suit requiring payment by the husband of a stated sum to the wife's attorney for his services is in excess of the power conferred by statute providing that in decreeing a divorce in favor of a wife or refusing one on the application of the husband, the court shall order the husband to pay all reasonable expenses of the wife in the prosecution or defense of the petition, such provision contemplating payment to the wife and not to the attorney.

Annotation: Order in divorce suit for payment of counsel fees to attorney for wife, rather than to wife. 118 A.L.R. 1138.

Evidence — *exculpatory statements on cross-examination.* In *Commonwealth v. Britland*, — Mass. —, 15 N. E. (2d) 657, 118 A.L.R. 132, it was held that where the prosecution proves statements of an accused tending to show that he is guilty, the rule that a defendant in a criminal case has no right to introduce in evidence self-serving statements does not preclude him from eliciting on cross-examination of the witnesses for the prosecution the whole of the subject matter, even though statements so drawn out are favorable to him.

Annotation: Right of defendant in criminal case, where state has introduced incriminating portion of conversation or statements made by him, to elicit or introduce in evidence his exculpatory statements. 118 A.L.R. 138.

Evidence — *value of real property.* In *Maxwell v. Iowa State Highway Com.* — Iowa, —, 271 N. W. 883, 118 A.L.R. 862, it was held that evidence as to the price at which other property in the neighborhood has been sold is inadmissible in an action for damages for the condemnation of a portion of a farm.

Annotation: Admissibility on issue

of value of real property of evidence of sale price of other real property. 118 A.L.R. 869.

Fair Trade — *prohibiting sale of commodities below cost.* In *Wholesale Tobacco Dealers v. National Candy & Tobacco Co.* — Cal. (2d) —, 82 P. (2d) 3, 118 A.L.R. 486, it was held that a statute prohibiting the sale of commodities below cost for the purpose of injuring competitors and destroying competition is valid if the means adopted have a real and substantial relation to the object sought.

Annotation: Validity, construction, and application of statutory provision prohibiting sale of commodities below cost. 118 A.L.R. 506.

Guaranty — *discounting note by guarantor.* In *Merchants Discount Corp. v. Federal Street Corp.* — Mass. —, 14 N. E. (2d) 155, 118 A.L.R. 412, it was held that neither a guarantor of a note who acquired it at a discount, nor one taking from him an assignment of the note with knowledge of the circumstances, can enforce it against its maker for its full face value.

Annotation: Right of principal, cosureties, or coguarantors to benefit of discount at which obligation is purchased or discharged by a surety or guarantor. 118 A.L.R. 416.

Highways — *injury to one riding tricycle on sidewalk.* In *Le May v. Oconto*, — Wis. —, 281 N. W. 688, 118 A.L.R. 1019, it was held that a statute which, in providing that city streets shall be divided into a carriage-way and a sidewalk on either side thereof, states that "the sidewalk shall be for the use of persons on foot and no person shall be allowed to encumber the same," does not limit to foot passengers the duty of the city to keep a sidewalk in repair, to the exclusion of a child riding a tricycle thereon.

Annotation: Liability of municipality for injury to one riding on sidewalk on bicycle, tricycle, or other vehicle. 118 A.L.R. 1023.

Imprisonment for Debt — *bastardy proceeding*. In *State v. Devore*, — Iowa, —, 281 N. W. 740, 118 A.L.R. 1104, it was held that a constitutional provision that no person shall be imprisoned for debt in any civil action precludes the commitment to jail of the defendant in a statutory proceeding of a civil character to determine the paternity of a bastard child and to provide for its support, until he shall furnish security for the payment of the amounts directed by the court to be paid for the child's support.

Annotation: Constitutional provision against imprisonment for debt as applicable in bastardy proceeding. 118 A.L.R. 1109.

Innkeepers — *injury to guest*. In *Parsons v. Dwight State Co.* — Mass. —, 17 N. E. (2d) 197, 118 A.L.R. 1099, it was held that where a hotel guest, while attempting to turn off the shower after taking a shower bath, the handle controlling which was hard to move, was scalded by a rush of boiling water and steam, the jury is warranted in finding not only that the valve was defective and dangerous but also that the failure to ascertain its condition and remedy the defect, or to withdraw the shower bath from use, or to notify those entitled to use it of the danger, constituted negligence on the part of the hotel management.

Annotation: Innkeeper's liability for injury to guest due to condition of plumbing or conditions in bathroom or shower room. 118 A.L.R. 1103.

Income Taxes — *computing gains or losses*. In *Schmidlapp v. Com. of Internal Revenue*, 96 F. (2d) 680, 118 A.L.R. 297, it was held that one who had, by purchases from time to time,

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accumulated a number of shares of bank stock, and who on selling some of them at a profit did not include it in his Federal income tax return but proceeded on the theory that he might use the proceeds of the first sales to amortize the whole purchase price and, after that had been extinguished, treat all later proceeds as profit, and who on selling the rest of the shares likewise applied the proceeds to the amortization of the purchase price, claiming the loss thus shown as an allowable deduction in computing taxable income, is not thereby precluded, after it has become too late to assess any tax for the year in which the sale of stock resulted in a profit, from asserting the privilege under article 58 of Treasury Regulation No. 74 of calculating his loss on the sale of the rest of the shares by allocating first purchases to first sales, notwithstanding had he done so on making the earlier sales there would have been a taxable gain for that year of nearly the same amount as the loss subsequently claimed.

Annotation: Method of computing income tax, or failure to report taxable income, in earlier year as precluding or estopping taxpayer in computation of tax for later year. 118 A.L.R. 302.

Income Taxes — "dealer" entitled to inventory securities at cost or market. In *Securities Allied Corp. v. Com. of Internal Revenue*, 95 F. (2d) 384, 118 A.L.R. 459, it was held that a finding of the Board of Tax Appeals that a corporation organized for the purpose of buying and selling securities is not a dealer and as such entitled, in determining taxable income, to inventory securities at cost or market, whichever is lower, is right, where the executive committee of the corporation meets daily to determine what securities to buy or sell through brokers, and it has no place of business

to which customers may come to buy.

Annotation: Right to use inventories, for income tax purposes, in respect of transactions in securities. 118 A.L.R. 462.

Insurance — joint pleasure trip as consideration for carrying passenger. In *Beer v. Beer*, 134 Ohio St. 271, 16 N. E. (2d) 413, 118 A.L.R. 388, it was held that when parties join in meeting the expense of a trip made for their mutual interest, pleasure, or benefit, the purpose of the trip on the part of the owner of the automobile is not the carrying of passengers for compensation, and such transportation is not within the provisions of an insurance policy prohibiting the "carrying of passengers for a consideration."

Annotation: Scope and application of exception as regards carrying passengers in policies of automobile insurance. 118 A.L.R. 393.

Insurance — time of death. In *Mullins v. National Casualty Co.* 273 Ky. 686, 117 S. W. (2d) 928, 118 A.L.R. 331, it was held that a provision of an accident insurance policy conditioning insurer's liability for the agreed indemnity on death ensuing within thirty days from the date of accident is not void as being unreasonable, oppressive, or vicious, even in a case where the life of the insured was prolonged for only a few hours beyond the thirty-day period by the extraordinary efforts made to keep him alive, and for twenty-four hours before he died he was practically pulseless.

Annotation: Provision of accident policy, or accident feature of life policy, which restricts liability for death to death occurring within specified period after accident. 118 A.L.R. 334.

Insurance — waiver of payment of first premium. In *Massachusetts Mutual L. Ins. Co. v. National Bank of*

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Commerce, 95 F. (2d) 797, 118 A.L.R. 1065, it was held that ordinarily, a delivery of a life insurance policy to the assured with an agreement to give credit for the premium amounts to a waiver of a condition that the policy shall not be in force until the payment of the first premium.

Annotation: Delivery of policy of life insurance without payment of premium as waiver of condition that policy shall not be in force until payment of first premium. 118 A.L.R. 1072.

Judges — eligibility. In *State v. Reeves*, — Wash. —, 82 P. (2d) 173, 118 A.L.R. 177, it was held that a statute providing for the retirement on half pay, out of a fund to be created by salary deductions and contributions from the state treasury, of judges who have served eighteen years in the aggregate, or who, having served ten years in the aggregate, shall have attained the age of seventy years or have become incapacitated, does not increase the emoluments of office of a judge, so far as a member of the legislature seeking election to the office of judge for a six-year term is concerned, within a constitutional provision that no member of the legislature, during the term for which he is elected, shall be appointed or elected to any civil office the emoluments of which shall have been increased during the term for which he was elected.

Annotation: Construction and application of constitutional or statutory provision that member of Congress or state legislature shall not, during term for which he is elected, be appointed or elected to any civil office which shall have been created or the emoluments of which shall have been increased during the term for which he was elected. 118 A.L.R. 182.

Landlord and Tenant — lease as conditional limitation. In *Markey v. Smith*, — Mass. —, 16 N. E. (2d) 20,

118 A.L.R. 274, it was held that the provision of a lease of land in an amusement park, habendum for the term of fifteen years from a date named, yielding and paying therefor as rent a percentage of the gross receipts from such attractions as the lessors may permit to be operated thereon during the term of the lease, and any taxes or assessments to which the premises may become liable, that the lease "shall be null and void" if the lessee shall fail for a period of thirty days during the season to operate the contemplated attraction and that the lessors may enter without notice or demand to expel the lessee if he shall fail to pay the rent and taxes or fail to perform any conditions or agreements in the lease, must, in view of the provisions of the habendum, be construed as a condition subsequent requiring a re-entry to terminate the lease and the consequent liability for rent, and not as a conditional limitation operating by its own force to terminate the lease.

Annotation: Language of lease as creating conditional limitation as distinguished from a condition subsequent, or vice versa. 118 A.L.R. 283.

Landlord and Tenant — termination because of fire. In *Scharbauer v. Cobean et al.*, 42 N. M. 427, 80 P. (2d) 785, 118 A.L.R. 102, it was held that leased premises are not rendered untenable within the provision of a store lease that in the event of the destruction of the premises by fire to such an extent as to render the same untenable the lease shall become void, where the damage done by a fire was repairable in four or five days, even though the continuance of business while the repairs were being made may have been impracticable.

Annotation Condition of premises within contemplation of provision of lease or statute for cessation of rent

Thirty-five

or termination of lease in event of destruction of or damage to property as result of fire. 118 A.L.R. 106.

Landlord and Tenant — waiver of forfeiture of lease. In *Hawley Corp. v. West Virginia Broadcasting Corp.* — W. Va. —, 197 S. E. 628, 118 A.L.R. 120, it was held that a landlord, after the forfeiture of a lease, notified a sublessee that the rights of the lessee had terminated, that the future rights of the sublessee would depend on negotiations with the landlord, and that the sublessee could pay the landlord rent for occupying the premises. The landlord's acceptance thereafter from the sublessee of the same sum per month as that reserved in the sublease, alone, did not re-establish it.

Annotation: Transaction between lessor and sublessee or assignee after forfeiture or cause of forfeiture by lessee as waiver of forfeiture. 118 A.L.R. 124.

Libel and Slander — charge of cutting prices. In *Meyerson v. Hurlbut*, — App. D. C. —, 98 F. (2d) 232, 118 A.L.R. 313, it was held that a cause of action is stated by a complaint which, without alleging special damages, avers that defendant has said of the plaintiff in the presence of at least one person that plaintiff has been cutting, below cost, prices on goods sold by him.

Annotation: Libel and slander: imputation of price-cutting. 118 A.L.R. 317.

Limitation of Actions — attorney's negligence. In *Sullivan v. Stout*, 120 N. J. L. 304, 199 A. 1, 118 A.L.R. 211, it was held that the statute of limitations begins to run upon a cause of action against an attorney for negligence in making a false or incorrect report of a title from the time when the result of the examination of the title is reported to the client and not from

the time when the error is discovered or consequential damage results.

Annotation: When statute of limitations begins to run upon action against attorney for malpractice. 118 A.L.R. 215.

Limitation of Actions — cancellation of deed for fraud. In *Davidson v. Salt Lake City*, — Utah, —, 81 P. (2d) 374, 118 A.L.R. 195, it was held that the limitation statute applicable to an action to have a deed set aside on the ground of fraud in its procurement and the title to the land described therein quieted in plaintiff is that relating to actions for relief on the ground of fraud or mistake and not the statute relating to actions for the recovery of possession of real property.

Annotation: Action by one not in possession of land to cancel deed upon ground of fraud as within statute of limitations applicable to actions for relief upon ground of fraud, or statute relating to actions for recovery of real property. 118 A.L.R. 199.

Municipal Corporations — lease by city of public utility as affecting subsequent competition. In *Kentucky-Tennessee Light & Power Co. v. Paris*, — Tenn. —, 114 S. W. (2d) 815, 118 A.L.R. 1025, it was held that an obligation on the part of a city not to engage in competition in the sale of electric current with one to whom it has leased its electric light and water plant under an agreement containing a provision for the ultimate acquisition of title by the lessee may not be implied from a stipulation therein that "in leasing said properties the lessee leases during the said lease period the good will of the city in said properties."

Annotation: Lease or sale of municipal plant or contract therefor as affecting right of municipality to compete. 118 A.L.R. 1030.

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Municipal Corporations — *liability for enforcement of invalid ordinance.* In *Elrod v. Daytona Beach*, — Fla. —, 180 So. 378, 118 A.L.R. 1049, it was held that a city, even though operating under the city manager or city commission form of government, performs, in enacting ordinances, a governmental function, and is therefore not liable in damages for the enforcement of an unconstitutional ordinance prohibiting house to house canvassing without a license.

Annotation: Liability of municipality for enforcement of an unconstitutional or void ordinance. 118 A.L.R. 1054.

Public Officers — *liability while acting under unconstitutional statute.* In *Gordon v. Conner*, — Okla. —, 80 P. (2d) 322, 118 A.L.R. 783, it was held that the sheriff and members of the board of county commissioners of a county will not be penalized, under §§ 5964 and 5965, Okla. Stat. 1931, 62 Okla. Stat. Anno. §§ 372, 373, for payments of salaries to deputies sheriff and for payments of expenses incurred by the sheriff and his deputies under an unconstitutional local act where such payments are made in good faith and before the law is declared unconstitutional, or before they are advised by the proper official as to its unconstitutionality.

Annotation: Liability of public officer in respect of public money paid out in reliance upon unconstitutional statute. 118 A.L.R. 787.

Social Security — *decisions under.* In *Capitol Building & Loan Asso. v. Kansas Com. of Labor & Industry*, 148 Kan. 446, 83 P. (2d) 106, 118 A.L.R. 1212, it was held that a building and loan association organized under Kansas law does not become a Federal instrumentality which is exempt from making contributions to the unemployment compensation fund by the

mere fact that it has subscribed for stock in a Federal Home Loan Bank, nor because of its consequent relationship thereto under pertinent state and Federal statutes.

Annotation: Judicial questions regarding Federal Social Security Act and state legislation adopted in anticipation of or after the passage of that act, to set up "state plan" contemplated by it. 118 A.L.R. 1220.

Succession Taxes — *insurance paid for out of community funds.* In *Lang v. Com. of Internal Revenue*, 304 U. S. 264, 82 L. ed. 1331, 58 S. Ct. 880, 118 A.L.R. 319, it was held that only half of such proportion of the proceeds of life insurance of a decedent domiciled in the State of Washington, in favor of his wife and children, as represents premiums paid out of funds of the marital community, is to be reckoned (less the permitted exemption) as a part of his gross estate for the purposes of Federal estate tax.

Annotation: Life insurance as affecting transfer or succession tax. 118 A.L.R. 324.

Wills — *funds remaining at termination of special use.* In *First National Bank & Trust Co. v. Baker*, 124 Conn. 577, 1 A. (2d) 283, 118 A.L.R. 339, it was held that where a portion of an estate is set aside for a particular use and no provision is made for its disposition at the end of the use, the fund, or so much thereof as is necessary, will, unless a different intent is evidenced by the will, go at the termination of the trust to make up deficiencies in particular gifts, in preference to a bequest made to a residuary legatee.

Annotation: Fund remaining at termination of testamentary trust or annuity as applicable to make up deficiencies in particular bequests in preference to claims of residuary beneficiaries. 118 A.L.R. 352.



THE HUMOROUS SIDE

A Country Lawyer's Solace.

When I'm sick of the grind,
And the feel of despair
Besets my worn mind;
As in my old chair
I swivel and turn,
And wish that a bit
Of old law I might learn
My new case to fit;
What then do I do?
Take it out in just wishing?
No! I throw down the law books,
And go off a fishing.

When some poor sickly girl,
With a whimpering boy,
Has told how a churl
Spouse has robbed her of joy
By committing misdeeds,
Such as beating her up;
Then I feel I must needs
Take it out on the pup,
And I wish I could thrash him;
But it's futile, this wishing,
So I dictate divorce papers,
And go off a fishing.

When some hard working log hands
With little to eat,
Say their "slippery Boss" stands
To give them "the beat,"
With a raft of fine logs
Hidden out on the bay,
Claims he's "gone to the dogs"
And "unable to pay,"
Then I wish that the law—
But it's folly, this wishing,
So I file loggers' liens,
And go off a fishing.

When some little old guy,
With his jaw in a sling,
And a patch on one eye,
And a crippled left wing,
Tells how some young chap,
Six feet or more tall,

Has mussed up his map
With a fist like a maul;
Then I wish I were Tunney;
But what's the use wishing?
So I swear out a warrant,
And go off a fishing.

When my creditors come
From every direction,
My bank balance is bum,
And I'm filled with dejection;
And clients are laggard,
And naught that I say,
Though I grow worn and haggard,
Will cause them to pay;
Then I wish I could raise—
But there's no use of wishing;
We all have to wait;
So I go off a fishing.

Oh! It's wormwood and gall,
When it's sultry and murk,
And I can't work at all
Though there's plenty of work;
To think of my tackle,
The troutlet at play,
And the lovely brown hackle
I bought yesterday;
Then to fish—how I wish—
But I don't stop at wishing
I jump in my flivver
And fliv off a fishing.

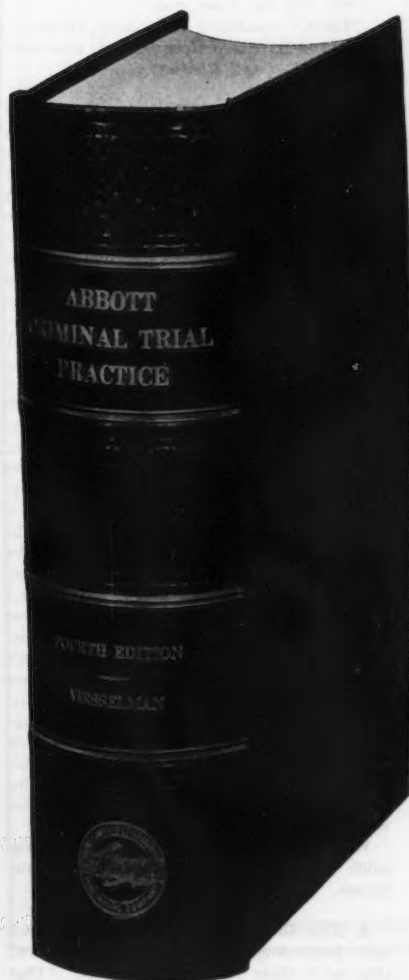
—JNO. MILLS DAY,
Auburn, Wash.

Full Faith But No Credit. The Standing Committee on Admissions to Practice in the United States District Court for the Northern Division of the Eastern District of Tennessee quite recently held a written examination of applicants to practice in this Court. One of the applicants made a most unusual and very amusing answer to a question on the Constitution of the United States:

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"Q. Explain briefly your conception of the meaning of the 'Full Faith and Credit' clause of the Constitution?

"A. 'Full Faith and Credit' means that a person on his oath will tell the truth, the whole truth and nothing but the truth. That full faith and credit will be given to one under oath, of course his credibility is considered."

The Committee decided that a grade of minus nothing would probably be correct for this answer.

Contributor: Charles H. Smith,
Knoxville, Tenn.

Public Use. Many years ago a young inventor devised a corset stay. He wanted to test it so he gave a set to one of his young lady friends.

Whether she approved of them or not we'll never know, but in a lawsuit to protect his patents the question of "what constitutes public use" arose because of this gift of the young inventor, the case finally went to the Supreme Court. This learned court held "as long as the young lady tried the corset stays that was enough to constitute 'public use.'"

Milk from Contented Cows. One of our valued contributors noticed the following ad of a personal loan company, to-wit: "Guarantee! If you are not entirely satisfied with your loan in every way, just return the money borrowed within ten days from the date of your loan and no charge will be made. 140,000 satisfied customers!!!"

"Does the above phraseology mean that no charge will be made for returning the money?"—*Denver Dicta*.

Always Change Your Venus! No. 14203. Wagner, etc., vs. People ex rel. McKenzie et al. County Court of Boulder County. Hon. E. J. Ingram, Judge. Affirmed.

Facts: Plaintiff in error is county superintendent of schools for Gilpin County. She moved for a change of venue and filed a special demurrer in response to an alternative writ of mandamus issued by Boulder County Court to unite with Davis, Boulder County superintendent of schools, in establishing and numbering a school district to be formed out of two established school districts, which lie partly in the two counties. An adverse ruling was had on the motion and demurrer and she applied for superseas.—*The Colorado Graphic*.

Well Within His Rights. A man excitedly entering a young lawyer's office, exclaimed: "A cat sits on my back fence every night and yowls and yowls, but I have lost my patience. Have I the right to shoot this cat?"

"I would hardly think so," replied the young lawyer. "The cat does not belong to you, as I understand it."

"No, but the fence does."

"Then," concluded the young lawyer, "I think you have a perfect right to tear down the fence."—*Legal Chatter*.

A Fortune Telling Docket. As an attorney in the good old state of Missouri mused over the titles of the actions which appeared in the court docket, the names of the litigants seemed to him portentous things which foreshadowed the vicissitudes of life. They grouped themselves in this wise:

Young v. Young, or life's springtime. Jolly v. Jolly and Laughter v. Laughter, or the merriment of carefree youth. Darling v. Buddy are apt synonyms for sweethearts. Then come Joy v. Joy and Goforth v. Followell, symbolic of marriage and partnership in life's adventure. But now the signs grow ominous. Sauer v. Sauer indicates that each believes that he or she has picked a lemon. Then we behold Jarmulowsky v. Keller, which, being liberally translated, signifies "Jar 'em loose or kill her." But help approaches for the beleaguered bride. Wolf v. Wolf indicates the hurried arrival of the mother-in-law. What she does is plenty, for Zabihajalio v. Pasek can have no other meaning than "Have him in Jail v. Pay Check." And here is Atwill v. McCall which hints vaguely of severed relations. Then comes Akins v. Akins and Payne v. Payne, which disclose suffering due to vain regrets. They are followed by Re Morse v. Wright, suggestive of twinges of conscience. Next appears Vesper v. Vesper, hinting of eventide and gathering shadows. Lastly, we see Administrator v. Life Insurance Co., which discloses the keen interest of heirs or creditors in the estate of the departed.

Why pay good money to get your fortune told? Let the court docket prognosticate the future.

A New Crime. In case No. 325 I find that John Angelonis is the defendant and that he is there charged as follows: "That John Angelonis did on or about the 14th

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In taking care of the many details for a lawyer who is interested in the citation phase of legal research—seeing that no step is overlooked, no matter what the haste, no requirement omitted—nothing can take the place of experience.

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Not many lawyers would trust to another's good luck the soundness of their position.

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day of August, A. D. 1935 at and in the County and State aforesaid commit the crime of operating a motor vehicle in a careless and wreckless manner, to-wit: on the left and wrong side of a public highway on a sharp turn of said public highway."

Contributor: Oliver W. Steadman,
Park County, Wyo.

Label for And/or. "The involvements of the contract are accentuated by the frequent use of the baffling symbol 'and/or'—a disingenuous modernistic hybrid, inept and irritating." Bell v. Gas Co. 116 W. Va. 298.

Contributor: Jno. Q. Hutchinson,
Beckley, W. Va.

A Printer's Error. Wedding Outfit—Like new; first \$30 takes it: 18-in. exhaust fan. 255 Avenue A. Main 5297-R.

—Advertisement in Rochester Democrat & Chronicle, Nov. 27, 1938.

A Realistic Levy. The newly elected constable had received his first writ of execution, wherein he was commanded "to levy of the goods and chattels of John Brown," etc.

In some way he had formed the opinion that to make a valid levy it was necessary that he should place his hands upon the property to be taken on execution. With this legal requirement uppermost in mind, and armed with the necessary document, he wended his way to the pasture field of defendant Brown. Therein, quietly feeding, were two or three gentle old milch cows and a young wild-eyed heifer calf.

Stealthily approaching the cows, Jones laid his hands on each in turn, repeating each time, with a voice bristling with authority, "Consider yourself levied upon."

The young heifer had been watching these legal proceedings with open-eyed amazement and fear, and as Jones approached her she sidled off. Again and again Jones attempted to touch the calf, but without success. Filled with wrath, and with visions of damage-suits for dereliction of duty, he made a wild spring for the calf, while the calf, equally agile, and with head and tail erect, made a wild dash for liberty. Away they raced, now Jones gaining, and now the calf,—the constable filled with official wrath, the calf with deadly fear. Just how this race might have terminated is hard to tell, had not the calf stumbled in making a jump over a small

brook, and going headlong into the water; Jones, close behind, with a terrible splash went in after the calf, lighting astride of that animal, and catching her by one ear, he brought his fist down with terrible emphasis on her back, with the withering legal yell, "and now, d-----n you, consider yourself levied on."

—J. P. Scores.

Medium of Publication Needed. Someone entrusted a note to a young lawyer for collection by suit, and he managed to get a sort of petition filed and summons served; but before court convened the defendant died. The case was called by Judge C. on the first day's docket, the young attorney H---- managed to make it known to the court that the defendant was dead.

"What do you want done with the case, Mr. H-----?" said the court.

H---- was nonplused, but after standing for a moment, his "cheek" came to his aid.

"Your honor," said he, "I will taken an order of publication."

"Well, Mr. H-----," said Judge C-----, in a wiry-edged voice, "can you name a paper that circulates where the defendant has gone?"

Domestic Relations. Bonyng, J., on *Marriage and Allied Matters*. New York State Bar. Assn., March 10, 1937.

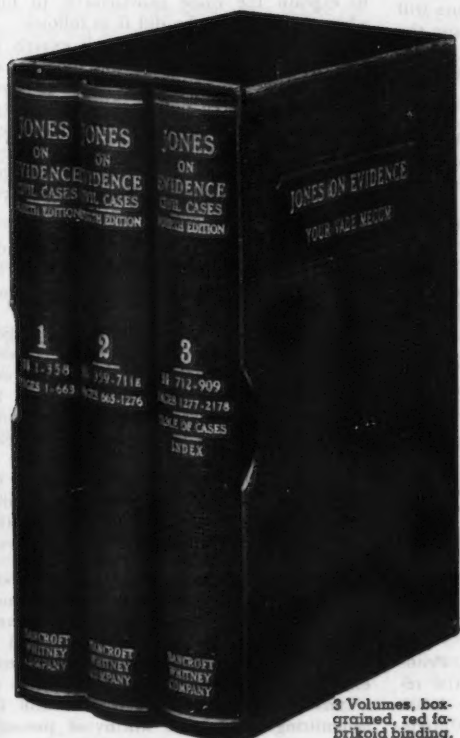
Plaintiff wife sought to annul marriage because husband refused to fulfill his promise to go through with a religious ceremony after a civil marriage. The plaintiff swore that there was no cohabitation following the civil rites. The court, after remarking that the case was one of several similar cases tried at the January term, observed:

"Such a recrudescence of religious fervor in the present age tends to tax the credulity of the court. Nor are its doubts allayed by the extraordinary lack of ardor and curiosity manifested by these young benedicts, or the quite exceptional fortitude and virtue displayed by the females of the species. In a word, the stories sound fantastic and unbelievable. However, truth is sometimes stranger than fiction, and it may well be that the nuptial couch has ceased to serve its time-honored function. In the face of recent warnings, old-fashioned jurists must not permit their antediluvian ideas to impede mankind's headlong progress toward the almost perfect state. Either they must streamline

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their ideas or be denied the privilege of earning even so little of their salt as they are said to merit nowadays. Already beauticians and surgeons are chortling at the profits of face-lifting and glandular operations in prospect for judges who hope to baffle their eager successors. Hence if the plaintiff will submit to a physical examination by a physician to be designated by the court, and his findings corroborate her claim that the marriage was never consummated, the court will defer to his superior wisdom. Otherwise the complaint will be dismissed." (B. v. B., Sup. Ct., Special Term, Pt. V, Kings County, Bonyne, J., Feb. 17, 1937.)

No Fooling with This Law Office. The following letter was sent to a client who was getting cold feet on proposed litigation. It speaks for itself.

"You come down here and you come down here at once. If your statement and your wife's statement is correct and honest you are going ahead with this. This office is not going to be imposed upon in any such manner by you or anybody else. When you come in here and tell us a story we act upon it.

"Again, you haven't put up a cent, yet you send us a long message collect. This dead-beatism is over. You get down here and get this straightened up and make that woman pay you back the money if she got it.

"I don't believe a word about your wife being sick. Now, no more lying goes. Come right down here.

"What property you have in Portsmouth, unless you come down, we will attach for our fee and our expense."

Contributed by S. Robt. Reiter,
Wheeling, W. Va.

The Ancient Right of Notice. A Pennsylvania correspondent, referring to the recent item relating to the notice to Adam before adjudication against him, calls attention to the following extract from an opinion of Sharswood, J., in *Palairot's Appeal*, 67 Pa. St. 479, where, in discussing the question of taking private property by the exercise of eminent domain, the court says: "When the King of Samaria coveted the little vineyard of Naboth hard by his palace, that he might have it for a garden of herbs, and offered to give him a better vineyard than it, or, if it seemed good to him, the worth of it in money, he was met by the sturdy answer, 'The Lord forbid it me that I should give

the inheritance of my fathers unto thee.'" Would anyone be hardy enough to stand up in a republican country and claim for its government a power which an eastern monarch dared not to assume?"

That Explains. A lawyer unexpectedly lost a case for a client who was a justice of the peace, and in his own opinion a very learned one. The lawyer was at a loss how to explain the cause satisfactorily to him when they met, but he did it as follows:

"Squire, I could not explain it exactly to an ordinary man, but to an intelligent man like you, who are so well posted in law and law phrases, I need only say that the judge said that the case was *coram non judice*." "Ah!" said the client, looking very wise and drawing a long breath, "if things had got into that fix, Mr. Lowry, I think we did very well to get out of it as easy as we did."

Guilty, Guilty, Guilty. A jury recently convicted itself of hog stealing, and fixed its own punishment at two years in the penitentiary.

Washington Brown was in court charged with appropriating a few of his neighbor's best sows. The evidence was all in, the jury had duly deliberated and was now back in its place ready to give its verdict. The foreman rose and in a solemn tone of voice read as follows:

"We, the defendant, find the jury guilty of hog theft as charged in the indictment, and fix his punishment as confinement in the state penitentiary for a term of two years."

A Mean Will. Imagine the consternation in the Surrogate's Court when a will containing the following provisions was offered for probate.

"It is my will that \$1,000 be put at interest for the following uses, to-wit:

"In view of and in anticipation of T. G. committing some crime worthy of prosecution, of which he is most capable, that it shall be the duty of my said executor to employ said interest and principal if necessary in employing a lawyer to prosecute him in all Civil Matters, and if there should be a case that would send him to the penitentiary or stretch his neck no means shall be withheld in prosecuting him to the death as he is a swindler, a liar, a scoundrel, and a hypocrite, and should my said executors fail to do this, my will, in relation to my nephew, G. T., then in that case they shall forfeit all

the interest they have in said estate as above mentioned."

Appropriate Clothing. Relatives were trying to break the will of the late Mrs. Brown. All of the various witnesses, except one, who took the stand didn't have much to offer as proof positive that the old lady had been insane at the time she made her will. Then one remembered that when Mrs. Brown's husband died some years before she laid him out in his casket clothed in "white flannels, a checkered vest, blue tie, white shoes, and panama hat."

When the Judge handed down his decision he had this to say. "We can not say that clothing suitable for Florida is so inappropriate for obsequies as to be an insane use thereof."

Can it be the Judge's judicial way of saying that old Mrs. Brown was smart enough to know that her husband would need cool clothing in the hereafter.

He Came Prepared. A look of horror spread over the judge's face when he saw a great hulk of a man start down the aisle with an axe over his shoulder and a knife in his belt. When he neared the judge he halted, looked around fiercely, but was silent.

The judge pulled himself together as best he could, and in a meek and trembling voice inquired why the man appeared before him so heavily armed.

"Wal, yer honor, the summons says, 'come provided with a means of defense' and as far as I'm concerned this here axe and knife is all I need."

Bugs to You. In an old court record in New Jersey the following affidavit of defense is filed:

"The said plaintiff ought not to maintain this suit, for at the time of the executing of the indenture the said dwelling house was, with knowledge of the plaintiff, infested and over-run by certain blood-sucking, obnoxious insects known as cimex lectual, the habits and irresistible impulses of which said insects were, and are, to come upon householders like a thief in the night and with force and forceps attack, harass, and make war upon householders, endangering the bodily comfort, peace and domestic felicity of said householders and causing them to flee away, in order that they may rest."

To Whom It May Concern. In the trial of a case one of the lawyers violated a court rule. In writing his decision, the judge admonished the young man to be more careful. He ended his cautioning by dictating "A word to the wise is all sufficient."

The secretary in transcribing the notes wrote into the opinion "A word to the wife is all sufficient" and the error was not detected.

When the lawyer, who had violated the court rule, read the decision he promptly sat down and wrote the judge the following letter:

"Dear Judge: Thank you very much for pointing out the error of my mays. You say 'a word to the wife is all sufficient.' At least 30,000,000 husbands will pay you anything you ask for that word."

A Lengthy Absence. It was a suit for divorce. The wife charged her husband with non-support and desertion. On direct examination the husband produced the following letter written by his wife.

"When the groceryman puts sand in the sugar, and the milkman makes milk out of chalk.

"When the boys stay at home with their mothers, and the girls forget how to talk.

"And after the ball is over and the railroad runs under the sea.

"And the man in the moon comes down in a balloon then, John, you may come back to me."

It didn't take long after that for the judge to decide who threw who out and for how long.

Personality Plus. It is said in Wing v. Hibbert (1897) 8 Oh. S. & C. P. 65, 7 Oh. N. P. 124, that: "John H. Hibbert left real estate, valued at about \$56,800.00 and personality of the value of about \$8,513.14."

M. L. C.

Self-Sufficient. He was sitting at the bar, downing one after another and laughing boisterously. Every so often, as he mumbled to himself, he would hold up his hand in protest. Finally the bartender's curiosity got the better of him. "What are you doing?" he asked. "I'm telling myself jokes," was the reply. "But why the hand in the air?" "Oh, that's when I stop me if I've heard it."

—Pelican.

Forty-five

CASE AND COMMENT

A Future Lawyer. Voice over phone: "Pop, guess who just got kicked out of college."—*Los Angeles Collegian*.

Why Cops Get Gray. It happened in Chicago: At a busy corner a traffic officer saw an old lady beckon to him. He held up two dozen cars, trucks and taxicabs to get to her side and inquire, "What is it, ma'am?" The old lady smiled and put her hand on his arm. "Officer," she said in a soft voice, "I just want to tell you that your number is the number of my favorite hymn."
—Neal O'Hara in *New York Post*.

What About the Ladies? If the owner of a ram or he-goat suffers it to go at large out of his enclosure between July first and December twenty-fifth, he shall, if prosecuted within thirty days after such ram or he-goat is found going at large, be punished by a fine of five dollars. C. 49, Sec. 42, Annotated Laws of Mass.

Enough Said. Counsel (to the police witness): "But if a man is on his hands and knees in the middle of the road, that does not prove he is drunk."

Policeman: "No, sir, it does not. But this one was trying to roll up the white line."
—*Philadelphia Bulletin*.

Throwing It at Him. Federal District Court. Johnnie Grimes, moulder, 1205 London Street, Portsmouth, filed petition of voluntary bankruptcy, listing liabilities at George T. Smith, attorney for petitioner.
Contributor: J. Lewis Thomas, Portsmouth, Va.

Unusual Search Warrant. To the Sheriff (or any Constable or Marshal) of Carter County, Greetings:

You are commanded to search the house now used and occupied by ----- as a residence, and the outbuildings and premises adjacent thereto (said residence is situated near Grayson, Ky., in Carter County, Ky.; and if you find on said premises or in or about said residence or buildings a two-story frame bldg., painted white, located on left-hand of Midland Trail going East, in Dixie Park, approx. 1 mile East of Grayson, Ky., and in Carter Co., Ky., known as the Canterbury property, you will seize and take possession of the same and deliver them together with this writ to me at my office as speedily as possible.

Forty-six

Witness my hand this the 24 day of Dec., 1938.

-----, C. J. C. C.
Executed by searching the within named property and taking from one Packard automobile 4 gallon of wine.
this 24 day of Dec., 1938.

By ----- S. C. C.
Contributor: J. M. Theobald,
Grayson, Ky.

A Bounding Title. The Secretary was a young girl who had been employed only a few weeks. Her employer was dictating an instrument in which he used the words "the following property, described by metes and bounds." When the typewritten instrument was returned to him it read, "the following property, described by leaps and bounds." His friends were surprised to find that his ankle wasn't sprained.

Contributor: Nell O. Sharpley,
Beaumont, Texas.

Snakes Alive! A lawyer in Birmingham, Alabama, wrote a certain packing company that his client had been made sick from eating a snake found in a can of their sardines, and that his client wanted damages. Here is the reply the lawyer got.

"Dear Sir:

"Replying to yours of the 16th about one ----- of Birmingham, Alabama, buying a can of our sardines and finding a snake in the can. We just don't take any stock in this. Snakes and fish don't go together.

"Our sardines are all packed under State and Federal Inspection and there aren't any snakes within miles of our plant.

"This looks like another hold-up and we get quite a few of them but they just don't work out. So, if you want to go ahead with this claim, go to it. We are all ready to fight any such stuff of this kind.

Yours very truly,

----- Packing Co."
Contributor: Mary Dunnivant,
Birmingham, Ala.

Dilemma. A noted Boston criminal lawyer before Justice Carr, Boston Municipal Court:

"It is Christmas your honor and we should be easy on the defendant."

Justice Carr: "I am going to be easy on the defendant, I am going to fine him the amount of your fee. How much is your fee?"

"Little drops of water, little grains of sand,
Make the mighty ocean and the pleasant land."

Carney

INCOME FROM SMALL CASES IN VARIOUS STAGES OF PRACTICE*



* Estimated from a combination of tables from a recent report.

- ¶ The pictogram above illustrates that a large part of legal income is from small fee cases.
- ¶ To efficiently handle these small cases **ANNOTATED LAWS OF MASSACHUSETTS** must be on your desk.
- ¶ The day you make the largest stride towards building a successful practice is not the day you win your most important case but the day you equip yourself to handle efficiently those numerous small cases which are the lot of all lawyers.

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CASE AND COMMENT

Lawyer: "I am not charging anything for my services, your honor."

Justice Carr: "Both cases on file."

Hot Dog! In an issue of the New York Law Journal, December 29th, in the judgment record for New York County, you will find that the City of New York obtained a judgment against A. Hamburger, for \$2.13.

Contributor: Paul J. Leach,
Mineola, N. Y.

Why Ask That One? "Suppose a witness, that you yourself had called in a case, failed to testify as you believed he would, and, in fact testified the other way, what would you say?" asked an examiner.

Various emotions passed over the face of the student, who, at last, taking in the enormity of the treachery of the witness, cried out indignantly, "I should say it was misplaced confidence!"

Good Practice. A clipping from the Albuquerque, N. M., Journal of December 14, 1938, as follows:

50 Years Ago: Members of a territorial jury were recently fined five dollars each by a judge for failure to reach a verdict.

Contributor: Edwin S. French,
Albuquerque, N. M.

Sober as a Judge. The sobriety of a judge is no question for a lay witness to discuss ruled the judge of Municipal Court in San Diego, California, recently during the trial of a case.

"Had you been drinking that day?" the prosecutor asked a defense witness.

"I was sober as a judge," replied the witness.

"I move to strike the words, 'as sober as a judge' as a conclusion of the witness," stated the prosecutor.

The judge, smiling, pondered the matter a while and then granted the motion.

Contributor: W. Howard Ferry,
San Diego, Calif.

At Least the Case Was Dead. Judge F. A. Irwin, of the Paulding County (Ga.) Superior Court, was trying to clear his docket and reached the case of Blank vs. Double Blank which had been on the docket for some time and had been passed for one cause or another. "What about this case?" he asked, "who represents the plaintiff?"

No one answered.

Finally some lawyer spoke up and said, "I think that Brother C. D. McGregor brought that case."

"What about it Brother McGregor? Where is the plaintiff?"

"He's dead," answered McGregor.

"How do you know that he is dead?" asked the Judge.

"Well," said McGregor, "it was like this, this fellow came into my office and told me that if I would file the suit that he would pay me the next Saturday if he lived. He must be dead."

The case was dismissed.

Contributor: R. E. L. Whitworth,
Dallas, Ga.

Help Needed. District court opened in a Utah town with a new judge and a new bailiff. The bailiff no doubt had heard witnesses sworn, but was not familiar with any form for opening court. The judge informed him that there was no set form, and he could use his discretion. I don't know whether the bailiff had the court or the lawyers in mind, but he got up and said "Hear ye, hear ye, this court is now in session, so help you God!"

Contributor: Orval Hafen,
St. George, Utah.

Reverter Clause. "Provided, as other and excepting the herewith deed as made and executed by Grantor herein, being to a time Trust herewith whereas to the sum in consideration thereto, is to money as so paid and advanced by Grantees to said named Grantor and in security to payment of same as due and owing said Grantees within a reasonable time, and in event of a default in payment thereof the title as herewith to rest absolutely in said Grantees, otherwise to said obligation being made, kept and payment in full of the same, this deed thereon to be returned to said grantor or his order, or if of record a reconveyance to be made by said grantees to said grantor of premise."

Contributor: F. H. Kellogg,
Santa Rosa, Calif.

How Are the Neighbors? I just ran across a deed which I thought might interest the readers of Case and Comment. After describing the property it adds "together with all improvements and impertinences thereunto belonging."

Contributor: Orval Hafen,
St. George, Utah.

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